

CA NO. 04-99003

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

\* \* \*

TERRY JESS DENNIS, by and  
through KARLA BUTKO, as Next  
Friend,

Petitioner-Appellant,

vs.

MICHAEL BUDGE, Warden, and  
BRIAN SANDOVAL, Attorney  
General of the State of Nevada,

Respondents-Appellees.

D.C. No. CV-S-04-0798-PMP-RJJ  
(Nevada, Las Vegas)

**Appeal from the United States District Court  
for the District of Nevada**

**APPELLANT'S EXCERPTS OF RECORD**

Volume XI of XI

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Federal Public Defender  
MICHAEL PESSETTA  
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Counsel for Petitioner-Appellant

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2 Nevada Bar No. 00014  
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FILED RECEIVED  
ENTERED SERVED ON  
COUNSEL/PARTIES OF RECORD

2004 JUN 14 P 4:08

CLERK US DISTRICT COURT  
DISTRICT OF NEVADA

BY \_\_\_\_\_ DEPUTY

CV-S-04-0798-PMP-RJJ

8 Attorneys for Petitioner/Next Friend

9 UNITED STATES DISTRICT COURT  
10 DISTRICT OF NEVADA  
11

12 TERRY JESS DENNIS, by and through )  
KARLA BUTKO, as Next Friend, )

13 Petitioner, )  
14 )

15 vs. )

16 MICHAEL BUDGE, Warden, and )  
BRIAN SANDOVAL, Attorney General )  
of the State of Nevada, )

17 Respondents. )  
18 )

Case No. \_\_\_\_\_

APPLICATION FOR LEAVE TO  
PROCEED IN FORMA PAUPERIS

EXECUTION SCHEDULED FOR:  
Week of July 19, 2004.

(Death Penalty Habeas Corpus Case)

19 Petitioner, Terry Dennis, through his next friend, requests leave to proceed *in forma pauperis*  
20 in this capital habeas proceeding. Petitioner Dennis is indigent and has been represented by  
21 appointed counsel throughout the state trial, appeal and habeas corpus proceedings. See Exhibit 2,  
22 attached. Despite the participation of a next friend, the petitioner remains the real party in interest.  
23 E.g., Whitmore v. Arkansas, 495 U.S. 149, 163 (1990). This application is based upon the attached  
24 declaration of counsel. Ex. 1: A declaration cannot be obtained from Mr. Dennis because he is

25 ///

26 ///

27 ///

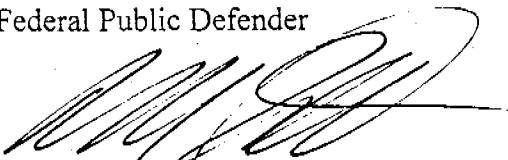
28 ///

1 seeking to have the state execute him, as a "direct result of his mental illness.

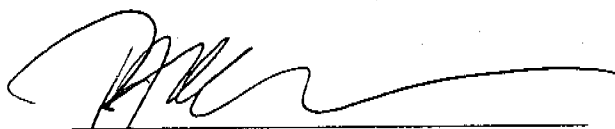
2 Dated this 14<sup>th</sup> day of June, 2004.

3 Respectfully submitted,

4 FRANNY A. FORSMAN  
Federal Public Defender

5 

6  
7 Michael Pescetta  
Assistant Federal Public Defender

8 

9  
10 Rebecca A. Blaskey  
Assistant Federal Public Defender


11 Attorneys for Petitioner/Next Friend  
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DECLARATION

MICHAEL PESCETTA declares as follows:

1. I am an attorney at law, admitted to practice before this Court, employed as an assistant federal public defender. I represent next friend Karla Butko who sues on behalf of petitioner, Terry Dennis, in this matter.
2. Mr. Dennis is indigent and he was represented by appointed counsel (the Washoe County Public Defender in the trial court and direct appeal proceedings, and Karla Butko and Scott Edwards in the state habeas corpus proceeding) throughout the state court proceedings respecting his capital conviction and sentence. See Ex. 2.
3. I am informed and believe that Mr. Dennis has no funds in his prison account or from other sources sufficient to pay the fees of counsel and the costs of this action.
4. A declaration attesting to Mr. Dennis' indigence cannot be obtained from him. I am informed and believe that Mr. Dennis has refused to meet with his appointed counsel, Mr. Edwards, and is maintaining his position that he wants the State to execute him. The Nevada courts have countenanced his position, despite uncontradicted expert evidence that Mr. Dennis' desire to be executed is "directly a consequence" of his mental illness, as alleged in the accompanying next friend petition.
5. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, that I would be competent to testify to it if called to do so, and that this declaration was executed at Las Vegas, Nevada, on June 14, 2004.

  
Michael Pescetta





1 TERRY DENNIS  
2 PRISON NO. 62144  
3 NEVADA STATE PRISON  
Post Office Box 607  
Carson City, Nevada 89702

4 IN PROPRIA PERSONA

5 DISTRICT COURT  
6 WASHOE COUNTY, NEVADA  
7

8 TERRY DENNIS,  
9 Petitioner,

10 vs.

11 DON HELLING, Warden at the  
Nevada State Prison and FRANKIE  
12 SUE DEL PAPA, Attorney General  
of the State of Nevada.

13 Respondents  
14

Case No. CR99-0611  
Dept. No. One

APPLICATION FOR LEAVE TO  
PROCEED IN FORMA PAUPERIS  
AND REQUEST FOR  
APPOINTMENT OF COUNSEL

(Death Penalty Case)

15 Petitioner Terry Dennis, asks leave to file the accompanying petition for post conviction relief,  
16 without prepayment of costs and to proceed in forma pauperis. Petitioner's affidavit in support of this  
17 request is attached hereto.

18 Petitioner further requests that counsel be appointed to represent him in this proceeding pursuant  
19 to Nev. Rev. Stat. §§ 34.750 and 34.820.

20 Dated this 5th day of April, 2001.  
21

22 Terry J. Dennis  
Terry Dennis, Petitioner  
23 Prison No. 62144  
24 Nevada State Prison  
Post Office Box 607  
25 Carson City, Nevada 89702  
26

1 TERRY DENNIS  
Prison No. 62144  
2 Nevada State Prison  
Post Office Box 607  
3 Carson City, Nevada 89702

4 In Propria Persona

5  
6 IN THE SECOND JUDICIAL DISTRICT COURT  
7 COUNTY OF WASHOE

8 \* \* \*

9 TERRY DENNIS,  
10  
11 Petitioner,

Case No. CR99-0611  
Dept No. One

12 vs.

13 DON HELLING, Warden at the  
Nevada State Prison and FRANKIE SUE  
DEL PAPA, Attorney General  
Of the State of Nevada,

AFFIDAVIT IN SUPPORT OF  
REQUEST TO PROCEED  
IN FORMA PAUPERIS

14 Respondents.

(Death Penalty Case)

15  
16 I, Terry Dennis, being first duly sworn, depose and say that I am the petitioner in the  
17 above-entitled case; that in support of my request to proceed without being required to prepay  
18 fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the  
19 costs of said proceeding or to give security therefor, and that I believe I am entitled to redress.

20 I further swear that the responses which I have made to the questions and instructions  
21 below relating to my ability to pay the cost of proceeding in this Court are true:

22 1. Are you presently employed? Yes \_\_\_\_ No X

23 a. If the answer is yes, state the amount of your salary or wages per  
24 month and give the name and address of your employer.

25 N/A  
26

1 b. If the answer is no, state the date of your last employment and the  
2 amount of the salary and wages per month which you received.

3 1994; \$8.00 per hour  
4 \_\_\_\_\_  
5 \_\_\_\_\_

6 2. Have you received within the past twelve months any income from a business,  
7 profession or other form of self-employment, or in the form of rent payments,  
8 interest, dividends, or other source?

9 Yes X No \_\_\_\_\_

10 a. If the answer is yes, describe each source of income, and state the  
11 amount received from each during the past twelve months.

12 I received the sum of \$340.00 as  
13 repayment of a loan  
14 \_\_\_\_\_

15 3. Do you own any cash or checking or savings account (include any funds in prison  
16 accounts)? Yes \_\_\_\_\_ No X

17 a. If the answer is yes, state the total value of the items owned.

18 N/A  
19 \_\_\_\_\_  
20 \_\_\_\_\_

21 4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable  
22 property (excluding ordinary household furnishings and clothing)? Yes \_\_\_\_\_

23 No X

24 a. If the answer is yes, describe the property and state its approximate  
25 value.  
26 \_\_\_\_\_

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N/A

5. List the persons who are dependent upon you for support and state your relationship to those persons.

None.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Dated this 5th day of April, 2001.

Terry J. Dennis  
Terry Dennis  
Prison No. 62144

CERTIFICATE

I hereby certify that the petitioner, Terry Dennis, has the sum of \$10.00 on  
account to his credit at ELY STATE PRISON where he is confined. I further certify that  
petitioner likewise has the following securities to his credit according to the records of said  
institution:

DATED: 13<sup>th</sup> day of March 2001

Sandra L Human  
Authorized officer of

Nevada Department of Prisons  
[prison]

22:15:45

NEVADA DEPARTMENT OF PRISONS  
NEVADA INMATE STORE SYSTEM (NISS)

INMATE ACCOUNT STATEMENT  
1/01/2001 - 1/31/2001

62144 DENNIS, TERRY J  
ESP - Elg State Prison

Trans Date	Description	Reference	Srv Date	Case No	Doc No	Pay	Offset	Trans Amt	Balance
1/31/2001	Closing Balance								10.00

Trans Date	Description	Reference	Srv Date	Case No	Doc No	Pay	Offset	Trans Amt	Balance
1/01/2001	Opening Balance								3.00
1/23/2001	SP INMATE STORE PURCHASE	000041998			A89302		5109	4.97	.13
1/29/2001	SP INMATE STORE PURCHASE	000042752			A89302		5109	.13	.00
1/31/2001	Closing Balance								.00

Trans Date	Description	Reference	Srv Date	Case No	Doc No	Pay	Offset	Trans Amt	Balance
1/01/2001	Opening Balance								.00
1/24/2001	MC Medical Charge-CUPAY	09112000	9/11/2000		A89281		3706	4.00	4.00
1/31/2001	PC PRESCRIPTION CHARGE-CUPAY	09112000	9/11/2000		A89281		3706	2.00	6.00
1/31/2001	Closing Balance								6.00

Trans Date	Description	Reference	Srv Date	Case No	Doc No	Pay	Offset	Trans Amt	Balance
1/31/2001	Closing Balance								125.88

Account/Inmate: 62144 Last: DENNIS First: TERRY 3  
Institution: ESP Effective Date: 8/18/1999 Unit: 3 Cell: 40  
Wing: A Bed: A

Type options, press Enter.  
5=Display 7=Freeze

		Frozen	
Sel	Fund Description	Fund Balance	Y/N Typ
[ ]	TRUST TRUST FUND	10.00	N T
[ ]	TRUS2 SECOND TRUST FUND	5.00	N T
[ ]	DEPT DEPARTMENT CHARGES FUND	6.00-	N D
[ ]	SAVE SAVINGS FUND	125.88	N S

F1=Help F3=Exit F12=Previous Roll Up/Down



NEVADA DEPARTMENT OF PRISONS  
INMATE FINANCIAL CERTIFICATE  
INMATE TRUST ACCOUNT ACTIVITY  
2000/09/14 THRU 2001/03/13

3/13/01  
12:10:16

TERRY J. DENNIS 62144

DATE	TYPE	FUND	DESCRIPTION	DEPOSIT	WITHDRAWAL	BALANCE
2000/09/14		TRUS2	OPENING BALANCE			.00
2000/12/08	DR	TRUS2	CMU STIPEND/NOVEMBER	5.00		5.00
2001/01/22	SP	TRUS2	Store Sale - 00004199B		4.87-	.13
2001/01/29	SP	TRUS2	Store Sale - 000042752		.13-	.00
2001/03/13		TRUS2	CLOSING BALANCE			.00
2000/09/14		TRUST	OPENING BALANCE			10.79
2000/09/21	PR	TRUST	LOCKBOX	40.00		50.79
2000/09/21	PR	TRUST	LOCKBOX		8.00-	42.79
2000/09/21	PR	TRUST	LOCKBOX		4.00-	38.79
2000/10/02	SP	TRUST	Store Sale - 000031931		27.05-	11.94
2000/10/16	SP	TRUST	Store Sale - 000033119		1.94-	10.00
2001/03/13		TRUST	CLOSING BALANCE			10.00

ER 1738

3/13/01  
12:10:16

TERRY J. DENNIS 62144

NEVADA DEPARTMENT OF PRISONS  
INMATE FINANCIAL CERTIFICATE  
2000/09/14 THRU 2001/03/13

PAGE 1  
180660

<u>TRAN DATE</u>	<u>DAILY BALANCE</u>	<u>DAILY DEPOSITS</u>	<u>NUMBER OF DEPOSITS</u>
2000/09/14	10.99	.00	0
2000/09/15	10.99	.00	0
2000/09/16	10.99	.00	0
2000/09/17	10.99	.00	0
2000/09/18	10.99	.00	0
2000/09/19	10.99	.00	0
2000/09/20	10.99	.00	0
2000/09/21	10.99	.00	0
2000/09/22	38.99	.00	0
2000/09/23	38.99	40.00	1
2000/09/24	38.99	.00	0
2000/09/25	38.99	.00	0
2000/09/26	38.99	.00	0
2000/09/27	38.99	.00	0
2000/09/28	38.99	.00	0
2000/09/29	38.99	.00	0
2000/09/30	38.99	.00	0
2000/10/01	38.99	.00	0
2000/10/02	38.99	.00	0
2000/10/03	11.94	.00	0
2000/10/04	11.94	.00	0
2000/10/05	11.94	.00	0
2000/10/06	11.94	.00	0
2000/10/07	11.94	.00	0
2000/10/08	11.94	.00	0
2000/10/09	11.94	.00	0
2000/10/10	11.94	.00	0
2000/10/11	11.94	.00	0
2000/10/12	11.94	.00	0
2000/10/13	11.94	.00	0
2000/10/14	11.94	.00	0
2000/10/15	11.94	.00	0
2000/10/16	10.00	.00	0
2000/10/17	10.00	.00	0
2000/10/18	10.00	.00	0
2000/10/19	10.00	.00	0

NEVADA DEPARTMENT OF PRISONS  
INMATE FINANCIAL CERTIFICATE  
2000/09/14 THRU 2001/03/13

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TERRY J. DENNIS 62144

TRAN DATE	DAILY BALANCE	DAILY DEPOSITS	NUMBER OF DEPOSITS
2000/10/20	10.00	.00	0
2000/10/21	10.00	.00	0
2000/10/22	10.00	.00	0
2000/10/23	10.00	.00	0
2000/10/24	10.00	.00	0
2000/10/25	10.00	.00	0
2000/10/26	10.00	.00	0
2000/10/27	10.00	.00	0
2000/10/28	10.00	.00	0
2000/10/29	10.00	.00	0
2000/10/30	10.00	.00	0
2000/10/31	10.00	.00	0
2000/11/01	10.00	.00	0
2000/11/02	10.00	.00	0
2000/11/03	10.00	.00	0
2000/11/04	10.00	.00	0
2000/11/05	10.00	.00	0
2000/11/06	10.00	.00	0
2000/11/07	10.00	.00	0
2000/11/08	10.00	.00	0
2000/11/09	10.00	.00	0
2000/11/10	10.00	.00	0
2000/11/11	10.00	.00	0
2000/11/12	10.00	.00	0
2000/11/13	10.00	.00	0
2000/11/14	10.00	.00	0
2000/11/15	10.00	.00	0
2000/11/16	10.00	.00	0
2000/11/17	10.00	.00	0
2000/11/18	10.00	.00	0
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2000/11/20	10.00	.00	0
2000/11/21	10.00	.00	0
2000/11/22	10.00	.00	0
2000/11/23	10.00	.00	0
2000/11/24	10.00	.00	0

NEVADA DEPARTMENT OF PRISONS  
INMATE FINANCIAL CERTIFICATE  
2000/09/14 THRU 2001/03/13

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TERRY J. DENNIS 62144

TRAN DATE	DAILY BALANCE	DAILY DEPOSITS	NUMBER OF DEPOSITS
2000/11/25	10.00	.00	0
2000/11/26	10.00	.00	0
2000/11/27	10.00	.00	0
2000/11/28	10.00	.00	0
2000/11/29	10.00	.00	0
2000/11/30	10.00	.00	0
2000/12/01	10.00	.00	0
2000/12/02	10.00	.00	0
2000/12/03	10.00	.00	0
2000/12/04	10.00	.00	0
2000/12/05	10.00	.00	0
2000/12/06	10.00	.00	0
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2000/12/08	10.00	.00	1
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2000/12/10	10.00	.00	0
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2000/12/12	10.00	.00	0
2000/12/13	10.00	.00	0
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2000/12/20	10.00	.00	0
2000/12/21	10.00	.00	0
2000/12/22	10.00	.00	0
2000/12/23	10.00	.00	0
2000/12/24	10.00	.00	0
2000/12/25	10.00	.00	0
2000/12/26	10.00	.00	0
2000/12/27	10.00	.00	0
2000/12/28	10.00	.00	0
2000/12/29	10.00	.00	0
2000/12/30	10.00	.00	0

NEVADA DEPARTMENT OF PRISONS  
INMATE FINANCIAL CERTIFICATE  
2000/09/14 THRU 2001/03/13

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TERRY J. DENNIS 62144

TRAN DATE	DAILY BALANCE	DAILY DEPOSITS	NUMBER OF DEPOSITS
2000/12/31	10.00	.00	0
2001/01/01	10.00	.00	0
2001/01/02	10.00	.00	0
2001/01/03	10.00	.00	0
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2001/01/05	10.00	.00	0
2001/01/06	10.00	.00	0
2001/01/07	10.00	.00	0
2001/01/08	10.00	.00	0
2001/01/09	10.00	.00	0
2001/01/10	10.00	.00	0
2001/01/11	10.00	.00	0
2001/01/12	10.00	.00	0
2001/01/13	10.00	.00	0
2001/01/14	10.00	.00	0
2001/01/15	10.00	.00	0
2001/01/16	10.00	.00	0
2001/01/17	10.00	.00	0
2001/01/18	10.00	.00	0
2001/01/19	10.00	.00	0
2001/01/20	10.00	.00	0
2001/01/21	10.00	.00	0
2001/01/22	10.00	.00	0
2001/01/23	10.00	.00	0
2001/01/24	10.00	.00	0
2001/01/25	10.00	.00	0
2001/01/26	10.00	.00	0
2001/01/27	10.00	.00	0
2001/01/28	10.00	.00	0
2001/01/29	10.00	.00	0
2001/01/30	10.00	.00	0
2001/01/31	10.00	.00	0
2001/02/01	10.00	.00	0
2001/02/02	10.00	.00	0
2001/02/03	10.00	.00	0
2001/02/04	10.00	.00	0

NEVADA DEPARTMENT OF PRISONS  
INMATE FINANCIAL CERTIFICATE  
2000/09/14 THRU 2001/03/13

3/13/01  
12:10:16  
TERRY J. DENNIS 62144

<u>TRAN DATE</u>	<u>DAILY BALANCE</u>	<u>DAILY DEPOSITS</u>	<u>NUMBER OF DEPOSITS</u>
2001/02/05	10.00	.00	0
2001/02/06	10.00	.00	0
2001/02/07	10.00	.00	0
2001/02/08	10.00	.00	0
2001/02/09	10.00	.00	0
2001/02/10	10.00	.00	0
2001/02/11	10.00	.00	0
2001/02/12	10.00	.00	0
2001/02/13	10.00	.00	0
2001/02/14	10.00	.00	0
2001/02/15	10.00	.00	0
2001/02/16	10.00	.00	0
2001/02/17	10.00	.00	0
2001/02/18	10.00	.00	0
2001/02/19	10.00	.00	0
2001/02/20	10.00	.00	0
2001/02/21	10.00	.00	0
2001/02/22	10.00	.00	0
2001/02/23	10.00	.00	0
2001/02/24	10.00	.00	0
2001/02/25	10.00	.00	0
2001/02/26	10.00	.00	0
2001/02/27	10.00	.00	0
2001/02/28	10.00	.00	0
2001/03/01	10.00	.00	0
2001/03/02	10.00	.00	0
2001/03/03	10.00	.00	0
2001/03/04	10.00	.00	0
2001/03/05	10.00	.00	0
2001/03/06	10.00	.00	0
2001/03/07	10.00	.00	0
2001/03/08	10.00	.00	0
2001/03/09	10.00	.00	0
2001/03/10	10.00	.00	0
2001/03/11	10.00	.00	0
2001/03/12	10.00	.00	0

NEVADA DEPARTMENT OF PRISONS  
INMATE FINANCIAL CERTIFICATE  
2000/09/14 THRU 2001/03/13

3/13/01  
12:10:16

TERRY J. DENNIS 62144

<u>TRAN DATE</u>	<u>DAILY BALANCE</u>	<u>DAILY DEPOSITS</u>	<u>NUMBER OF DEPOSITS</u>
2001/03/13	10.00	.00	0

NEVADA DEPARTMENT OF PRISONS  
INMATE FINANCIAL CERTIFICATE  
2000/09/14 THRU 2001/03/13

3/13/01  
12:10:16

TERRY J. DENNIS 62144

START DATE	END DATE	TOTAL DAILY BALANCES	NUMBER OF DAYS	AVERAGE MONTHLY BALANCE
2000/09/14	2000/10/13	649.10	29	22.38
2000/10/14	2000/11/13	313.88	31	10.13
2000/11/14	2000/12/13	300.00	30	10.00
2000/12/14	2001/01/13	310.00	31	10.00
2001/01/14	2001/02/13	310.00	31	10.00
2001/02/14	2001/03/13	260.00	28	10.00

START DATE	END DATE	TOTAL DEPOSITS	NUMBER OF DEPOSITS	AVERAGE MONTHLY DEPOSITS
2000/09/15	2000/10/13	40.00	1	40.00
2000/11/14	2000/12/13	5.00	1	5.00

CURRENT ACCOUNT BALANCE	2001/03/13	10.00
AVERAGE MONTHLY BALANCE		12.09
AVERAGE MONTHLY DEPOSITS		7.50
AVERAGE TOTAL MONTHLY DEPOSIT		7.50




1                                    CERTIFICATE OF SERVICE VIA FEDERAL EXPRESS

2            I hereby certify that on the 6<sup>th</sup> day of April, 2001, I served a true and correct copy of the  
3 APPLICATION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND REQUEST FOR  
4 APPOINTMENT OF COUNSEL AND AFFIDAVIT IN SUPPORT OF REQUEST TO  
5 PROCEED IN FORMA PAUPERIS on the following parties by delivering an envelope containing  
6 a copy of the foregoing by Federal Express, addressed as follows:

7                                    Attorney General  
8                                    State of Nevada, Criminal Justice Division  
9                                    Capitol Complex  
10                                   100 North Carson Street  
11                                   Carson City, Nevada 89710-4717

12                                   District Attorney, Washoe County  
13                                   Criminal Justice Division  
14                                   75 Court Street  
15                                   P.O. Box 30083  
16                                   Reno, Nevada 89520-3083

17                                     
18                                   \_\_\_\_\_  
19                                   An Employee of the Federal Public Defender  
20  
21  
22  
23  
24  
25  
26

CERTIFICATE OF SERVICE

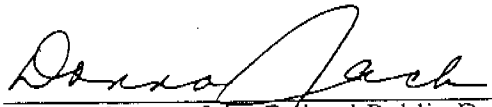
In accordance with Rule 5(b) of the Federal Rules of Civil Procedure, the undersigned hereby certifies that on the 14<sup>th</sup> day of June 2004, a true and correct copy of the foregoing APPLICATION FOR LEAVE TO PROCEED IN FORMA PAUPERIS, was deposited in the United States mail, first class postage prepaid, addressed to counsel as follows:

Brian Sandoval  
Attorney General  
Robert E. Wieland  
Senior Deputy Attorney General  
Criminal Justice Division  
5420 Kietzke Lane, Suite 202  
Reno, Nevada 89511

Scott W. Edwards  
Attorney at Law  
1030 Holcomb Avenue  
Reno, Nevada 89502

Richard A. Gammick  
Washoe County District Attorney  
Post Office Box 30083  
Reno, Nevada 89520

Mr. Terry Dennis, #62144  
Nevada State Prison  
Post Office Box 607  
Carson City, Nevada 89702

  
An employee of the Federal Public Defender

1 FRANNY A. FORSMAN  
Federal Public Defender  
2 Nevada Bar No. 00014  
MICHAEL PESSETTA  
3 Assistant Federal Public Defender  
Nevada Bar No. 002437  
4 REBECCA A. BLASKEY  
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5 Assistant Federal Public Defender  
330 South Third Street, #700  
6 Las Vegas, Nevada 89101  
Telephone (702) 388-6577  
7 Facsimile (702) 388-5819

8 Attorneys for Petitioner/Next Friend

9  
10 UNITED STATES DISTRICT COURT  
11 DISTRICT OF NEVADA

12 TERRY JESS DENNIS, by and through  
13 KARLA BUTKO, as Next Friend,

14 Petitioner,

15 vs.

16 MICHAEL BUDGE, Warden, and  
BRIAN SANDOVAL, Attorney General  
of the State of Nevada,

17 Respondents.  
18

Case No. \_\_\_\_\_

MEMORANDUM WITH RESPECT TO  
STANDING OF NEXT FRIEND

EXECUTION SCHEDULED FOR:  
Week of July 19, 2004.

(Death Penalty Habeas Corpus Case)

19  
20 The Federal Public Defender, counsel for petitioner through next friend Karla Butko, submits  
21 the following memorandum on the issue of petitioner's ability to make a competent, rational and

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

CV-S-04-0798-PMP-RJJ

FILED RECEIVED  
ENTERED SERVED ON  
COUNSEL / PARTIES OF RECORD

2004 JUN 14 P 4:08

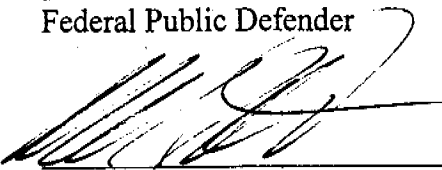
CLERK US DISTRICT COURT  
DISTRICT OF NEVADA

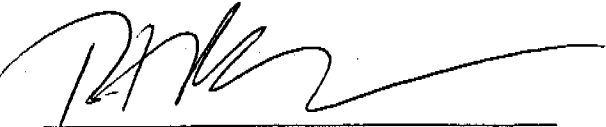
BY \_\_\_\_\_ DEPUTY

1 voluntary choice to waive further review of his capital conviction and sentence.

2 Respectfully submitted this 14<sup>th</sup> day of June, 2004.

3 FRANNY FORSMAN  
4 Federal Public Defender

5   
6 Michael Pescetta  
7 Assistant Federal Public Defender

8   
9 Rebecca A. Blaskey  
10 Assistant Federal Public Defender

11 Attorneys for Petitioner/Next Friend  
12  
13  
14  
15  
16  
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1                                    MEMORANDUM OF POINTS AND AUTHORITIES

2 I.        Introduction

3            A next friend petition for a writ of habeas corpus has been filed, alleging substantial  
4 constitutional issues, on behalf of Terry Jess Dennis, a Nevada inmate facing execution. The initial  
5 question presented here is whether the next friend has standing to sue in the petitioner's name.<sup>1</sup> The  
6 issue of the next friend's standing to litigate on behalf of the petitioner is a jurisdictional question.  
7 See Whitmore v. Arkansas, 495 U.S. 149, 164 (1990).

8            In this case it is clear that standing does exist. The only recent and thorough psychiatric  
9 evaluation of Mr. Dennis, which is uncontradicted by any evidence, establishes that Mr. Dennis'  
10 decision to abandon further litigation and be executed is "directly a consequence" of his mental  
11 disorders. A court-appointed psychiatrist, Dr. Bittker, examine Mr. Dennis on November 24, 2003  
12 and prepared a report that detailed Mr. Dennis' history of abuse at the hands of his adoptive family,  
13 alcohol abuse, diagnoses of bipolar disorder and depression, and suicide attempts, and included the  
14 following findings:

15                    [T]he defendant has sustained over years episodes of suicidal  
16 ideation, suicide attempts, and self-destructive behavior, which  
17 heralded both the instant offense and his current legal strategy. I  
18 believe, with a reasonable degree of medical certainty, that the  
19 defendant's desire to both seek the death penalty and to refuse appeals  
20 in his behalf are directly a consequence of the suicidal thinking and  
21 his chronic depressed state, as well as his self-hatred .

22                    ...

23                    [I]t is conceivable and, in my mind, likely that both the defendant's  
24 offense and his current court strategy springs from his psychiatric  
25 disorder and his substance abuse disorder, that he wishes to die and  
26 he wishes to be certain of a reasonably humane death. Consequently,  
27 the death penalty, as provided by the state, is quite congruent with  
28 both his intent and his psychiatric disorder.

Ex. 50 at 8-9.

                  This uncontradicted expert evidence establishes next friend standing. Under Rees v. Peyton,

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26            <sup>1</sup>The next friend, Ms. Butko, was Mr. Dennis' counsel in the state habeas corpus  
27 proceedings. She has Mr. Dennis' interests at heart, and Mr. Dennis himself has expressed  
28 "some regard" for her. Ex. 50 at 6. An attorney can appropriately act as next friend. E.g., In re  
Cockrum, 867 F.Supp. 494, 495 (E.D. Tex. 1994); Lenhard v. Wolff, 443 U.S. 1306, 1310  
(1979) (Rehnquist, J., in chambers).

1 384 U.S. 312 (1966) (per curiam), a capital litigant's decision to cease litigation and accept  
2 execution is not competent if the individual "is suffering from a mental disease, disorder or defect  
3 which may substantially affect his capacity" to "make a rational choice with respect to continuing  
4 or abandoning further litigation . . . ." Id. at 314; accord Whitmore v. Arkansas, 495 U.S. 149, 166  
5 (1990). Mr. Dennis' decision, which the only expert evidence indicates is "directly a consequence"  
6 of Mr. Dennis' diagnosed mental disorders, necessarily satisfy the Rees standard, which requires  
7 only that the decision be "substantially affected" by the disorder.

## 8 II. Procedural Background

9 Petitioner Dennis was charged with first degree murder in the Second Judicial District Court,  
10 Washoe County, on March 29, 1999, and the state filed a notice of intent to seek the death penalty  
11 on April 14, 1999. Ex. 7. On April 16, 1999, Mr. Dennis pleaded guilty, with the intent of receiving  
12 the death penalty. Ex. 8. Mr. Dennis had been examined by Edward J. Lynn, M.D., on March 19,  
13 1999. Dr. Lynn's report noted Mr. Dennis' history of sexual and physical abuse, his previous  
14 diagnoses of post-traumatic stress disorder and bipolar II disorder, his "bouts of depression," at least  
15 one hospitalization and a suicide attempt. The report noted his "severe psychological disorder" and  
16 rated his depression as "moderate to severe," but despite the conclusion that Mr. Dennis was  
17 "clinically depressed" the report indicated that he was competent to proceed. Ex.12.

18 At the penalty hearing before a three-judge panel, uncontradicted evidence was before the  
19 court that Mr. Dennis suffers from mental illness, including bipolar disorder and post-traumatic  
20 stress disorder, and that he had a long history of suicide attempts and abuse at the hands of his  
21 family. It was also undisputed that prior to the homicide for which the death sentence was imposed,  
22 Mr. Dennis sought help for his mental disorders, which were making him want to kill a woman. Exs.  
23 18 at 4, 19 at 49, 5 at 329. The Veteran's Administration admitted him briefly, medicated him, and  
24 then "cut him loose." Ex. 19 at 49. Mr. Dennis refused to allow introduction of mitigating evidence  
25 beyond his own statements and his mental health records. Exs. 21 at 34, 39-46, 55-56; 22 at 71. The  
26 three-judge panel - - not surprisingly, in view of the overwhelming death-proneness of such panels,  
27 see Beets v. State, 107 Nev. 957, 977-978, 821 P.2d 1044, 1058-1059 (1991) (Young, J., dissenting)  
28 - - obliged Mr. Dennis' wish for self-destruction and imposed a death sentence. Ex. 25. The Nevada

1 Supreme Court affirmed the conviction and sentence. Dennis v. State, 116 Nev. 1075, 13 P.3d 434  
2 (2000). Ex. 58.

3 Mr. Dennis then filed a verified petition for writ of habeas corpus in the district court. Ex.  
4 26. The district court ultimately denied all relief and Mr. Dennis appealed. Ex. 41. Counsel filed  
5 an opening brief on appeal on September 16, 2003, Ex. 43, raising substantial issues, including the  
6 question of the retroactivity of Ring v. Arizona, 536 U.S. 584 (2002), a question which is pending  
7 before the United States Supreme Court. Summerlin v. Stewart, 341 F.3d 1082 (9<sup>th</sup> Cir. 2003) (en  
8 banc) (holding Ring retroactive), cert. granted sub nom. Schriro v. Summerlin, 124 S.Ct. 833 (2003);  
9 contra, Colwell v. State, 118 Nev. \_\_\_, 59 P.3d 463 (2002).

10 After the notice of appeal was filed, Mr. Dennis wrote to the state district court, the district  
11 attorney, and the Nevada Supreme Court, expressing a desire to abandon the appeal in order to be  
12 executed. Ex. 42. On motion of the state, Ex. 46, the Nevada Supreme Court remanded the case to  
13 the district court to determine if Mr. Dennis was competent to decide to withdraw the appeal. Ex.  
14 48. The Court instructed the district court to conduct an inquiry into Mr. Dennis' competence to  
15 abandon his appeal, and specified that:

16 [I]n determining competence, the district court should ascertain (1)  
17 whether appellant has sufficient present ability to consult with his  
18 attorney with a reasonable degree of factual understanding and (2)  
whether appellant has a rational and factual understanding of the  
proceedings.

19 On remand, the district court appointed a psychiatrist, Thomas E. Bittker, M.D., to examine  
20 Mr. Dennis and furnish a report on his capacity to proceed. The court directed Dr. Bittker to answer  
21 specific questions, but the questions the district court propounded were the standard inquiries made  
22 in connection with competence to proceed to trial.<sup>2</sup> The district court did not ask Dr. Bittker to

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23  
24 <sup>2</sup> The questions the district court posed were:

25 The written report shall specifically address: (1) whether Petitioner  
26 has sufficient present ability to consult with his attorney with a  
27 reasonable degree of factual understanding and (2) whether  
28 appellant has a rational and factual understanding of the  
proceedings. Dr. Bittker shall state in his report any professional  
opinion he has regarding the Petitioner's competence to waive  
appeal and forego possibly life-saving litigation. Further, Dr.  
Bittker shall review all medication taken by Petitioner to evaluate

1 provide an opinion on Mr. Dennis' mental state under the correct standard enunciated in Rees v.  
2 Peyton, 384 U.S. 312, 314 (1966) (per curiam), that is whether Mr. Dennis' decision was  
3 "substantially affected" by his mental disorder.

4 Dr. Bittker examined Mr. Dennis on November 24, 2003, reviewed records, interviewed  
5 counsel, and prepared a report. Ex. 50. Dr. Bittker's report diagnosed Mr. Dennis with bipolar  
6 disorder, chemical dependency, attention deficit hyperactivity disorder (ADHD), post-traumatic  
7 stress syndrome (PTSD), mixed personality disorder with schizoid characteristics, and severe  
8 depression.<sup>3</sup> Dr. Bittker's report reviewed evidence of a childhood filled with physical and sexual  
9 abuse at the hands of Mr. Dennis' adoptive parents. Illustrative of Mr. Dennis' disorder is his belief  
10 that his arrest as a juvenile was directly responsible for his adoptive father's death. Mr. Dennis'  
11 background includes a significant history of poly-substance abuse, including use of amphetamines,  
12 cocaine, marijuana, and alcohol. He has sustained "frequent head injuries," but has never received  
13 a neuropsychological examination to confirm the extent of his impairment. Dr. Bittker's report  
14 states that Mr. Dennis has suffered from auditory and visual hallucinations.<sup>4</sup> After his arrest in the  
15

16 what if any impact said medication has on the Petitioner's state of  
17 mind and competence.

18 <sup>3</sup> Dr. Bittker's report classified Mr. Dennis' mental disorders into the following  
19 categories found in the Diagnostic and Statistical Manual of Mental Disorders:

- 20 AXIS I: 1) Bipolar Disorder, Type II, 296.89  
21 2) Alcohol Dependence, 303.90  
22 3) Amphetamine Dependence, now in remission, 304.40  
23 4) Cannabis Dependence, 304.30  
24 5) Cocaine Dependence, 304.20  
25 6) Nicotine Dependence, 305.10  
26 7) Posttraumatic Stress Disorder, by history, 309.81  
27 (cardinal signs denied during my interview with the defendant)  
28 8) Attention Deficit/Hyperactivity Type, 314.01  
#2 through #5 above in institutional remission.
- 29 AXIS II: Mixed Personality Disorder with Antisocial,  
30 Cyclothymic, Borderline, and Schizoid Features, 301.90
- 31 AXIS III: 1) Hepatitis C.  
32 2) Psoriasis.
- 33 AXIS IV: Severe. Social isolation, institutionalization, problems with  
34 the criminal justice system.
- 35 AXIS V: 50/50.

36 <sup>4</sup> See p. 13, below.



1 instant offense, Mr. Dennis falsely bragged to the police about "multiple killings" that he allegedly  
2 committed. Ex. 50 at 7.

3 The psychiatric report also reveals beyond any doubt that Mr. Dennis suffers from a life-long  
4 history of suicidal ideation. Dr. Bittker's report notes a significant medical history of "chronic  
5 suicidal ideation since [Mr. Dennis] was a child," as well as a history of suicide attempts stretching  
6 back to 1966. Ex. 50 at 5. Mr. Dennis was discharged from military service in Vietnam due to the  
7 fact that he was "suicidal, Ex. 50 at 3;" he "had made several attempts to seek admission to the VA  
8 Hospital to contain his homicidal fantasies, Ex. 50 at 4;" he has admitted to at least four and as many  
9 as twelve suicide attempts, Ex. 50 at 5-6; he "admits to frequent periods of despair, profound  
10 negativity, and feelings of hopelessness, helplessness, and worthlessness, Ex. 50 at 5;" he  
11 experienced the death of a roommate in the week prior to the instant offense, Ex. 50 at 3; and he  
12 sought hospitalization at the VA hospital in the period "immediately prior to the instance [sic]  
13 offense" but was "rejected." Ex. 50 at 6. The quality of Mr. Dennis' delusional thinking is apparent  
14 from his "supposed" belief that he must be executed for taking the life of another, Ex. 50 at 7,  
15 despite his consistently-expressed lack of concern for anyone, and his previous statements that he  
16 had done the victim a favor by "putting her out of her misery." Ex. 20 at 100.<sup>5</sup>

17 Mr. Dennis has had a significant medication history and is currently being administered drugs  
18 that affect his mental abilities. In the past, Mr. Dennis has been prescribed prozac, paxil, zoloft,  
19 elavil, trazodone, depakote, and lithium. He is currently being treated with trazodone and lithium.  
20 Id. Lithium is prescribed for treatment of manic episodes in patients with bipolar disorder and its  
21 use has been shown to impair mental abilities. See generally Physicians' Desk Reference at 1497  
22 (58<sup>th</sup> ed. 2004). Trazodone is an antidepressant that may induce dizziness or drowsiness. See  
23 <http://www.psyweb.com/Drugtm/trazod.html>. In the remand hearing in the state district court, Mr.  
24 Dennis acknowledged that he was taking the lithium and trazodone. Ex. 51.

25 Dr. Bittker's report responded to the district court's specific questions in a way that would  
26

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27 <sup>5</sup>Dr. Bittker's report indicates that Mr. Dennis' present decision to terminate his post-  
28 conviction remedies "came following the rejection of his defense counsel's effort to seek  
appellate review of his original sentence." Ex. 50 at 4.

1 reflect a finding of competence under that standard. Ex. 50 at 8.<sup>6</sup>

2 The critical part of the report, however, is Dr. Bittker's finding that he believed, "with a  
3 reasonable degree of medial certainty, that the defendant's desire to both seek the death penalty and  
4 to refuse appeals in his behalf are directly a consequence of the suicidal thinking and his chronic  
5 depressed state, as well as his self-hatred." Ex. 50 at 8. Dr. Bittker further expressed his opinion  
6 that it is:

7 [L]ikely that both the defendant's offense and his current court  
8 strategy spring from his psychiatric disorder and his substance abuse  
9 disorder, that he wishes to die and he wishes to be certain of a  
10 reasonably humane death. Consequently, the death penalty, as  
provided by the state, is quite congruent with both his intent and his  
psychiatric disorder. Ex. 50 at 8-9.

11 The district court then conducted a hearing at which it admitted Dr. Bittker's report but at  
12 which, on the agreement of Mr. Dennis, it did not take testimony. Ex. 51 at 17. The court engaged  
13 in a colloquy with Mr. Dennis, in which he essentially vouched for his own rationality. Counsel for  
14 Mr. Dennis pointed out that the standard for competence that the court referred to in its inquiry to  
15 Dr. Bittker was not the correct standard for allowing withdrawal of the appeal under Rees v. Peyton.  
16 The court, however, apparently agreed with the prosecutor to disregard Rees in favor of a standard  
17 that the mental disorder must "prevent" a rational choice, and proceeded to rule that Mr. Dennis is

18  
19 <sup>6</sup> Dr. Bittker's report, states:

- 20 1) The defendant does have sufficient present ability to  
consult with his attorney with a reasonable degree of factual  
21 understanding.  
22 2) The defendant has a rational and factual understanding of  
the proceedings. He is fully aware of the charges that he  
23 confronts, the implication of the sentence, and has a full  
understanding of what is involved in the death penalty. He  
24 is also aware of the legal options available to him and the  
consequences of his not proceeding with these options.  
25 3) The defendant is currently taking medications that are  
reasonable and consistent with the diagnosis of Bipolar  
26 Disorder, and his primary psychiatric problems, alcohol,  
amphetamine, and cocaine dependence, are contained by  
27 virtue of the total institutional control in his life.  
28 4) The medications that he is taking are not having any  
unusual effect on the defendant's ability to make decisions  
in behalf of his own interest, and to cooperate with counsel  
or to participate in the court hearing.

1 competent to waive his right to further review.<sup>7</sup>

2 The Nevada Supreme Court, without briefing, argument, or any analysis under the standard  
3 of Rees v. Peyton, directed counsel for Mr. Dennis to file a "voluntary" withdrawal of the appeal,  
4 in an order signed by one justice of the Court. Ex. 53. Counsel for Mr. Dennis filed a motion to  
5 withdraw the appeal on February 2, 2004. Ex. 59.

6 On March 12, 2004, the Nevada Supreme Court filed an order dismissing the appeal. Ex. 56.  
7 It upheld the state district court's conclusion that Mr. Dennis' waiver of further proceedings was  
8 knowing, intelligent and voluntary, but, although its order cited Rees v. Peyton, it did not relate the  
9 standard of Rees to Dr. Bittker's report. It also denied the Federal Public Defender's motion to  
10 submit a brief as amicus curiae, essentially on the ground that adversary litigation of the issue of Mr.  
11 Dennis' competence was not required. Ex. 56.

12 III. ARGUMENT

13 A. The Uncontradicted Expert Evidence that Mr. Dennis' Decision to Waive His Further  
14 Review of His Death Sentence is "Directly a Consequence" of His Mental Illness  
Establishes that the Waiver is Invalid

15 1. The Nevada Courts Did not Apply the Correct Legal Standard on the Issue  
16 of Whether Mr. Dennis' Waiver was "Substantially Affected" by His Mental  
Illness

17 The standard of competence applicable to Mr. Dennis' purported waiver of his right to habeas  
18 review was enunciated by the United States Supreme Court in Rees v. Peyton, 384 U.S. 312 (1966)  
19 (per curiam). In Rees, the petitioner, who was under sentence of death, sought to withdraw his  
20 properly-filed petition for certiorari. Counsel indicated to the court that he could not accede to  
21 petitioner's request without obtaining a psychiatric evaluation. The psychiatrist retained by counsel  
22

23 7

The court finds Dennis is competent to waive his  
appeal and any other form of legal relief by any  
means that might spare his execution. Dennis has  
sufficient present ability to consult with his attorney  
with a reasonable degree of factual understanding,  
and he has a rational and factual understanding of  
the legal proceedings. The court finds that Dennis  
has voluntarily, knowingly, and intelligently waived  
his right to pursue further forms of relief that might  
save his life, including his right to appeal in  
CR99P0611, Supreme Court Case No. 41664.

1 believed petitioner was incompetent, but state-selected psychiatrists expressed doubts that he was  
2 insane. The Supreme Court directed the federal district court to conduct a hearing and it held that  
3 the issue was:

4 [W]hether [petitioner] has capacity to appreciate his position and  
5 make a rational choice with respect to continuing or abandoning  
6 further litigation or on the other hand whether he is suffering from a  
mental disease, disorder, or defect which may substantially affect his  
capacity in the premises.

7 Id. at 314 (emphasis added). The standard imposed by Rees - - whether the litigant's mental illness  
8 may "substantially affect his capacity" to "make a rational choice with respect to continuing or  
9 abandoning further litigation," id. at 314, is the same standard used to determine the issue of standing  
10 to appear as a next friend to assert an incapacitated person's right to review on habeas corpus.  
11 Whitmore v. Arkansas, 495 U.S. 149, 166 (1990); Demosthenes v. Baal, 495 U.S. 731, 735-736  
12 (1990).

13 Thus, in addition to the cognitive "capacity to appreciate his position," the petitioner must  
14 be able to make a "rational choice." Assessment of the rationality of that choice turns on "whether  
15 he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity"  
16 to waive further litigation. As one court of appeals has put it:

17 [I]f the person is suffering from a mental disease or defect which does  
18 not prevent him from understanding this legal position and the  
19 options available to him, does that disease or defect, nevertheless,  
prevent him from making a rational choice among his options?

20 Rumbaugh v. Procnier, 753 F.2d 395, 398 (5<sup>th</sup> Cir. 1985).

21 The additional requirement of rational choice requires more than mere cognitive  
22 understanding: therefore, this element requires a different showing than what is required to be  
23 competent to stand trial and to plead guilty. Mata v. Johnson, 210 F.3d 324, 329 n.2 (5<sup>th</sup> Cir. 2000)  
24 (distinguishing between competency to stand trial and plead guilty, citing Godinez v. Moran, 509  
25 U.S. 389 (1993), and Dusky v. United States, 362 U.S. 402, 402-403 (1960) (per curiam), and the  
26 Rees standard for competency to waive discretionary review).

27 Under Rees, there can be no reasonable dispute that Mr. Dennis' decision to withdraw the  
28 appeal cannot be a "rational choice" because it is "substantially affect[ed]" by his mental illness.

1 Dr. Bittker's report could hardly be clearer: after listing the mental disorders from which Mr. Dennis  
2 suffers, Ex. 50 at 7, 8, Dr. Bittker concluded that Mr. Dennis' attempt to waive the appeal is "directly  
3 a consequence of the suicidal thinking and his chronic depressed state . . .," Ex. 50 at 8, and this  
4 "strategy springs from his psychiatric disorder . . ." Ex. 50 at 9.<sup>8</sup> Dr. Bittker came to this conclusion  
5 without even being asked to offer an opinion under the standard of Rees, and thus his expert opinion  
6 is all the more persuasive because it did not come in response to any prompting as to the correct legal  
7 standard. The evidence before this Court, and its precise fit with the standard prescribed by Rees,  
8 makes extended discussion of this point unnecessary: there can be no dispute that a waiver decision  
9 that is "directly a consequence" of mental illness meets the standard of incompetence under Rees,  
10 which requires that the decision be only "substantially affect[ed]" by mental illness. Nothing in the  
11 record before the state district court, or in the colloquy between that court and Mr. Dennis in the  
12 hearing on remand from the Nevada Supreme Court, remotely contradicts Dr. Bittker's finding,  
13 which the state district court did not directly address. See Mata v. Johnson, 210 F.3d at 332 (holding  
14 that district court violated due process by failing to address psychiatrist's report that was contrary  
15 to court's conclusion).

16  
17 B. The State Courts Did Not Apply the Controlling Standard in Rees v. Peyton and  
18 Their Decisions that Mr. Dennis' Waiver is Valid Are Not Entitled to Any Deference

18 The erroneous conclusions reached by the state district court flow from the error as to the  
19 correct legal standard. The questions the state district court posed to Dr. Bittker (following the  
20 Nevada Supreme Court's order of October 23, 2003), and which Dr. Bittker's report answered, were  
21 the elements for finding competence to stand trial. See, e.g., Dusky v. United States, 362 U.S. 402,  
22 402-403 (1960) (per curiam). The standard for trial competence is not the same as the standard for  
23 withdrawing an appeal. See Mata v. Johnson, 210 F.3d at 3291 n.2. The state district court's order  
24 entirely fails to apply the correct standard: that court ruled that "Dennis has sufficient present ability  
25

---

26 <sup>8</sup> Depression is, of course, one of the characteristics of bipolar disorder (formerly called  
27 manic-depressive disorder), as are suicide attempts. See Diagnostic and Statistical Manual of  
28 Mental Disorders at 382-383, 392-396 (4<sup>th</sup> ed. Text Revision 2000). Dr. Bittker's finding is  
supported by Mr. Dennis' psychiatric history. In 1995, Mr. Dennis referred to his suicide  
attempts by overdoses of drugs and by carbon monoxide poisoning because "he would prefer to  
go to sleep than to inflict some violent means upon himself." Ex. 5 at 186.

1 to consult with his attorney with a reasonable degree of factual understanding, and he has a rational  
2 and factual understanding of the legal proceedings.” Ex. 52 at 6. This is a finding under the Dusky  
3 standard, which does not address the Rees standard. Similarly, the state district court noted that  
4 “Dennis does not suffer from any disease or mental defect that prevents him from making a rational  
5 choice among his various legal options.” However, the court did not consider whether Mr. Dennis  
6 was suffering from a mental disease that “may substantially affect” his capacity to make a rational  
7 choice. See Rees, 384 U.S. at 314 (emphasis supplied).

8 By confusing the applicable legal standards, the state district court (following the lead given  
9 in the Nevada Supreme Court’s order) and the Nevada Supreme Court itself, left the competence  
10 decision without any legal support. E.g. Wade v. Terhune, 202 F.3d 1190, 1195 (9<sup>th</sup> Cir. 2000) (no  
11 presumption of correctness to state-court factfindings when incorrect legal standard applied).  
12 Although a habeas petitioner’s competence to abandon further proceedings is considered a factual  
13 one, this Court cannot afford any presumption of correctness to the state courts’ conclusions on the  
14 issue. Cf. 28 U.S.S.C. 2254(e). The proceedings in which the competence determination was made,  
15 in both the state district court and the Nevada Supreme Court, were not full and fair hearings,  
16 because they did not include any adversary litigation of the issues. These proceedings thus did not  
17 satisfy the basic requirements of due process of law, and due process protections apply in habeas  
18 corpus proceedings, E.g., Moran v. McDaniel, 80 F.3d 1261, 1271 (9<sup>th</sup> Cir. 1996); see Easter v.  
19 Endell, 37 F.3d 1343, 1345 (8<sup>th</sup> Cir. 1994) (state habeas proceedings must satisfy due process  
20 standards for procedural default and specifically to waiver decisions); St. Pierre v. Cowan, 217 F.3d  
21 939, 949 (7<sup>th</sup> Cir. 2000); see also Martinez v. Lamagno, 515 U.S. 417, 423 n.4 (1995) (noting  
22 appointment of amicus curiae to argue adversary position where parties declined to do so); Granville-  
23 Smith v. Granville-Smith, 349 U.S. 1, 4 (1954) (same); Chicago Grand Truck Ry. Co. v. Wellman,  
24 143 U.S. 339, 345-346 (1892) (noting danger of deciding constitutional issues in absence of  
25 adversary litigation).

26 In this case, the lack of adversary litigation is crucial, because the state courts founded their  
27 conclusions in part on the basis of statements made by Mr. Dennis himself, which were not subjected  
28 to cross-examination to assess their accuracy, and which were inconsistent with previous statements

1 he had made and with other evidence before the court. See p. 15, below. Under these circumstances,  
2 the state courts' conclusions cannot be afforded a presumption of correctness. See, e.g., Taylor v.  
3 Maddox, 366 P.3d 992, 999, 1001 (9<sup>th</sup> Cir. 2004) (per Kozinski, J.) (defects in process afforded at  
4 hearing precludes applying presumption of correctness). Similarly, the failure of the Nevada  
5 Supreme Court to apply the standard of Rees v. Peyton to the uncontradicted evidence in Dr.  
6 Bittker's report - - that Mr. Dennis' decision to abandon further litigation is "directly a consequence"  
7 of his mental disorders - - and the failure of the state district court to consider the Rees standard at  
8 all, render the state court decisions "contrary to" federal law imposed by Rees, or, at minimum, an  
9 unreasonable determination of the facts in light of the evidence under 28 U.S.C. § 2254(d). See, e.g.,  
10 Miller-El v. Cockrell, 537 U.S. 322, 346 (2003) (disregarding crucial evidence results in  
11 unreasonable determination in light of evidence); Taylor v. Maddox, 366 F. 3d at 1001, 1007-1008  
12 (ignoring evidence "highly probative and central to" issue and failing to take "key aspect" of  
13 evidence into account); Collins v. Rice, 365 F.3d 667, 686 (9<sup>th</sup> Cir. 2004) (failing to address all  
14 evidence).

15 C. The State Courts Erred in Ignoring Uncontradicted Expert Evidence that Mr. Dennis'  
16 Waiver Decision was "Directly a Consequence" of His Mental Disorders

17 As shown above, the only expert evidence before the courts on the relevant issue did show  
18 that Mr. Dennis' waiver decision was "directly a consequence" of his mental disorders, and thus his  
19 decision was "substantially affected" by his mental illness under Rees v. Peyton. The state district  
20 court simply ignored the uncontradicted finding on this point in Dr. Bittker's report. The state  
21 district court clearly erred in failing to address these uncontradicted expert conclusions which are  
22 directly contrary to its ruling. See Mata, 210 F.3d at 332 (holding that district court deprived  
23 petitioner of due process when it "made no mention of [the psychiatrist's] report and conclusion"  
24 that were contrary to its holding); cf. Rumbaugh v. Procunier, 753 F.2d 395, 399-401 (5<sup>th</sup> Cir. 1985)  
25 (district court resolved contradictory findings in psychiatric report by allowing expert the opportunity  
26 to explain whether petitioner's mental illness substantially affected his capacity).

27 Instead, in the hearing the state district court relied upon its own lay assumptions, not based  
28 on any evidence in the record, to reject Dr. Bittker's relevant findings. The court stated that Dr.

1 Bittker's representations about Mr. Dennis' "suicidal thinking and depressed state are not supported  
2 at least from 1999 forward." Ex. 51. However, the court did not actually acknowledge the factual  
3 basis for Dr. Bittker's conclusions that Mr. Dennis' mental illness does affect his present decision  
4 to withdraw his appeal. The court also erred in discounting Dr. Bittker's conclusions about Mr.  
5 Dennis' suicidal tendencies "as global statements that date back to Mr. Dennis' childhood." Ex. 51  
6 at 16. On the contrary, a "global" assessment, which includes evidence from Mr. Dennis' childhood,  
7 is critical to an accurate diagnosis as to whether he is presently suffering from suicidal ideation.  
8 Indeed, the very definition of a mental disorder in the DSM-IV-TR, includes "a clinically significant  
9 behavioral or psychological syndrome or pattern that occurs in an individual . . . ." Id. at xxxi  
10 (emphasis supplied).

11 Similarly, the state district court's rejection of Dr. Bittker's finding that Mr. Dennis suffers  
12 from a "chronic depressed state" as "not supported" for the period since 1999, Ex. 51 at 16, is itself  
13 entirely unsupported by any evidence. There was no expert testimony contradicting Dr. Bittker's  
14 finding that Mr. Dennis suffers from depression. Mr. Dennis himself asserted, at the plea canvass,  
15 that he had been treated for years for "severe chronic depression," Ex. 9 at 9, and that he suffers from  
16 "Bipolar Two Disorder." Ex. 9 at 8. That disorder necessarily includes depression. DSM-IV-TR  
17 392-395. When asked at the plea canvass if he was still suffering from any mental illness, Mr.  
18 Dennis replied, "I imagine so. But, I mean, they just don't go away." Ex. 9 at 10. (emphasis  
19 supplied). At the penalty hearing, Mr. Dennis again agreed that he was not "totally sane." Ex. 21 at  
20 42. He again specifically acknowledged that he suffers from Bipolar II Disorder, which he explained  
21 as follows:

22 The condition itself used to be called manic depressive, okay. You  
23 go in extreme manic stages, and then you have extreme depressive  
24 stages.

25 I didn't have the manic. I would vary from the - - bipolar II is another  
26 diagnosis for that. I go from what would be more or less normal to  
27 severe depression.

28 Ex. 21 at 40. The state district court's rejection of Dr. Bittker's finding of "chronic depression" is  
thus contrary to Mr. Dennis' own representations: the whole point of "chronic" disorders is that, as



1 Mr. Dennis himself put it, "they just don't go away."<sup>9</sup> Dr. Lynn's report, and the other mental health  
2 records before this Court, consistently indicate that Mr. Dennis' depression is ongoing. He has  
3 repeatedly been diagnosed with "recurrent" depression, Ex. 5 at 13, 365, and Dr. Lynn's 1995 report  
4 indicated not only that his psychological disorder was "severe" and his clinical depression  
5 "moderate to severe," but that Mr. Dennis is "prone to depression." Ex. 12 at 2.<sup>10</sup>

6 The state district court's statement at the hearing that depression would be a "logical  
7 condition" for someone on death row, Ex. 51 at 16, is based on no evidence whatsoever. The district  
8 court's reliance on its own lay assumption, unsupported by any evidence, that it is "logical" for  
9 anyone on death row to be clinically depressed is a *reductio ad absurdum* of the entire hearing: it  
10 cannot comport with due process under the state and federal constitutions for a court to rely on its  
11 own uninformed assumptions as a basis for ignoring uncontradicted expert evidence on the effect  
12 of a mental disorder on an individual's mental state.

13 The state district court also relied upon its own colloquy with Mr. Dennis as an indication  
14 of his competence. It should go virtually without saying that the observations of lay individuals are  
15 particularly likely to yield unreliable assessments of a defendant's mental processes. See Lokos v.  
16 Capps, 625 F.2d 1258, 1267 (5<sup>th</sup> Cir. 1980) ("one need not be catatonic, raving, or frothing, to be  
17 unable . . . to relate realistically to the problems of his defense"); Lafferty v. Cook, 949 F.2d 1546,  
18 1555 (10<sup>th</sup> Cir. 1991) (untrained people often have difficulty recognizing signs of mental illness from  
19 defendant's demeanor); see also Miller ex rel. Jones v. Stewart, 231 F.3d 1248, 1254 (9<sup>th</sup> Cir. 2000)  
20 (Fisher, J., concurring) ("crediting [petitioner's] position begs the question of his competence"), stay  
21 vacated, 531 U.S. 986 (2000).

22 In addition, the court did not (and did not have the expertise to) consider information that Dr.  
23 Bittker was able to gather from Mr. Dennis as far as his affect and other non-verbal indicators when  
24 speaking about and answering the doctor's questions relating to his suicidal ideation. For example,

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26 <sup>9</sup>Indeed, the full description of Bipolar II Disorder is "recurrent major depressive episodes  
27 with hypomanic episodes." DSR-IV-TR 392.

28 <sup>10</sup>The medications Mr. Dennis is receiving, trazodone and lithium, are prescribed for  
depression and bipolar disorder respectively, and this in itself indicates that Mr. Dennis is  
currently suffering from those disorders.

1 Dr. Bittker's report described him as "emotionally distant," and "constricted," and noted that "he  
2 appeared on the threshold of tears" at one point in the interview. Ex. 50 at 5. The district court was  
3 also in no position, as a lay person, to evaluate Mr. Dennis' affectless declarations that he "would  
4 rather not live than live" and be an old man in prison, and that living in prison is "not living." An  
5 expert could find a striking similarity between those statements and statements Mr. Dennis made  
6 when he was actively suicidal. Ex. 5 at 18. ("... feeling helpless, hopeless and worthless." 'I just  
7 want to be peaceful,' 'I don't know what I'll do,' 'I can't see the point in this anymore.'"), 227  
8 ("nothing to live for"), 166 ("he does not care to live anymore"), 186 ("he would prefer to go to sleep  
9 than to inflict some violent means upon himself"), 34 ("cornered and desperate"). In fact, Dr.  
10 Bittker's report made the direct correlation between Mr. Dennis' "psychiatric disorder" and his  
11 resulting decision that "he wishes to die and he wishes to be certain of a reasonably human death,"  
12 which is strikingly similar to Mr. Dennis' expressed wish to "go to sleep," when he was actively  
13 suicidal in 1995. The fact that Mr. Dennis may appear lucid and rational to a lay observer does  
14 nothing to contradict Dr. Bittker's expert findings. That Mr. Dennis' decision - - however  
15 persuasively stated by him - - is in fact "directly a consequence" of his mental disorder was not a  
16 factual issue within the state district court's lay knowledge, since otherwise the expertise of mental  
17 health professionals would be irrelevant.

18 Further, the state district court's reliance on Mr. Dennis' own statements at the remand  
19 hearing further reduced the reliability of the hearing itself. Uncritical reliance on the statements of  
20 an individual seeking to be executed is particularly problematic when, as here, there is no actual  
21 adversarial litigation to ferret out inaccuracies. Ex. 51 at 41. For instance, at Mr. Dennis' request,  
22 the court in the remand hearing purported to "correct" Dr. Bittker's report on some issues. Mr.  
23 Dennis denied telling Dr. Bittker that he suffered from auditory or visual hallucinations, and denied  
24 having them, Ex. 51 at 5-6, and the state court made that "correction." Exs. 51 at 7, 52 at 4. In Mr.  
25 Dennis' statement to the police, however, which was before the court, he explicitly asserted that "I  
26 get these thoughts and voices telling me to do things and sometimes I listen, sometimes I don't."  
27 Ex. 20 at 118. (Emphasis supplied). Mr. Dennis' mental health records repeatedly documented his  
28 statements that he has had auditory hallucinations. Ex. 5 at 17 (reporting "voices which tell him to

1 do things he doesn't want to do"), Ex. 5 at 227, 365.<sup>11</sup>

2 The state district court did not challenge Mr. Dennis' attempt to make himself appear more  
3 competent by denigrating the credibility of Dr. Bittker's report on factually inaccurate grounds.  
4 Counsel for Mr. Dennis, who explicitly expressed his view that he was unable to argue against Mr.  
5 Dennis' competence, Ex. 51 at 41, did not correct these inaccuracies. The prosecutor - - "the  
6 representative . . . of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall  
7 win a case, but that justice shall be done." Lay v. State, 116 Nev. 1185, 1194, 14 P.3d 1256, 1262  
8 (2000), quoting Kyles v. Whitley, 514 U.S. 419, 439-440 (1995), quoting Berger v. United States,  
9 295 U.S. 78, 88 (1935) - - did not correct them either.

10 The state district court also relied on the mental health evaluation of Mr. Dennis by Dr. Lynn  
11 that was performed in 1999, in which Dr. Lynn found Mr. Dennis competent under the Dusky  
12 standard although he was "clinically depressed." There has been a lapse of almost five years since  
13 Mr. Dennis' prior competency evaluation, and the passage of time decreases the probative value of  
14 the prior evaluations. See Comer v. Stewart, 215 F.3d 910 (9<sup>th</sup> Cir. 2000); Mata, 210 F.3d at 330;  
15 Brewer v. Lewis, 989 F.2d 1021, 1022-1024 (9<sup>th</sup> Cir. 1993) (district court properly denied next friend  
16 standing where no evidence in recent state court proceeding, or presented to district court, showed  
17 decision to terminate legal proceedings affected by mental disease, and only evidence presented by  
18 next friend was report from psychiatrist who did not examine inmate, which speculated that inmate  
19 "may" not be competent). The prior evaluation is a particularly weak indication of Mr. Dennis'  
20 current competence because it also did not consider the effect of his adjustment to his current  
21 confinement situation, see Comer v. Stewart, 215 F.3d 910, 916 (9<sup>th</sup> Cir. 2000) (collecting cases),  
22 nor did it address Mr. Dennis' competence to decide to abandon all litigation in order to be executed.  
23 The state district court's written questions posed to Dr. Bittker also did not seek any opinion as to  
24 the effects of Mr. Dennis' current confinement situation on his mental state, and the doctor's report  
25 does not address this issue. Even assuming that it has some relevance, the previous evaluation did

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26  
27 <sup>11</sup>Mr. Dennis also claimed not have told Dr. Bittker about, or to have any recollection of,  
28 "heavy use of alcohol or drug abuse by the relatives of his biological mother," and the district  
court noted this "correction." At the plea canvass and in the penalty hearing, however, Mr.  
Dennis himself represented that there was a history of alcoholism in his biological mother's  
family. Exs. 5 at 364, 9 at 18-19, 21 at 43-44.

1 not analyze the effect of Mr. Dennis' mental diseases or disorders on the rationality of the decision  
2 to seek execution, and thus it does not contradict Dr. Bittker's finding that Mr. Dennis' waiver  
3 decision is "directly a consequence" of his mental illness. Further, the previous evaluation was  
4 concerned with the standard of competence to stand trial or plead guilty, which, as pointed out  
5 above, is not the legal standard applicable here. It is axiomatic that the propriety of each waiver of  
6 a right must be assessed individually. See Rice v. Olson, 324 U.S. 786, 788-789 (1945) (guilty plea  
7 not equivalent to waiver of counsel). The court's reliance on the previous evaluation thus only  
8 exacerbated the court's failure to apply the appropriate standard itself.

9       The Nevada Supreme Court's order dismissing the appeal suffers from the same deficiencies  
10 as the state district court's order. While the Supreme Court's order quotes Dr. Bittker's report, Ex.  
11 56 at 3, it does not address his claim finding "to a reasonable degree of medical certainty," that Mr.  
12 Dennis' decision to abandon the litigation is "directly a consequence of the suicidal thinking and his  
13 chronic depressed state ...." In particular, the order does not relate this clear finding to the standard  
14 of Rees v. Peyton, which the order cites but does not discuss. Ex. 56 at 6 n. 9. Instead, the Court  
15 upheld the district court's decision on the basis of the "totality of the evidence," including Mr.  
16 Dennis' own statements. Ex. 56 at 6. Here again, the state court did not address the fact that there  
17 was evidence in the record directly contradicting Mr. Dennis' statements, which was not brought to  
18 the attention of the district court, and about which Mr. Dennis was not cross-examined, because of  
19 the absence of adversarial litigation in the district court proceeding.

20       Thus the hearing in the state district court and the proceedings in the Nevada Supreme Court,  
21 present the classic problems of a non-adversarial proceeding: reliance on an incorrect legal standard,  
22 reliance on inaccurate evidence not challenged by the parties, and rejection of uncontradicted  
23 evidence on no factual basis at all. Neither the district court's order, nor the record created in the  
24 district court, nor the Nevada Supreme Court's order dismissing the appeal, comports with basic  
25 standards of due process under the state and federal constitutions or with the reliability guarantee of  
26 the Eighth Amendment. Accordingly, neither of the decisions of the state courts is entitled to any  
27 deference. See, e.g., Williams v. Taylor, 529 U.S. 362, 405-406 (2000) (under AEDPA, state court  
28 ruling entitled to no deference "if the state court applies a rule that contradicts the governing law set

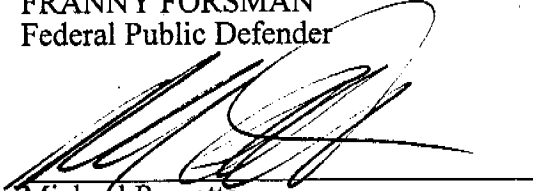
1 forth in our cases.”); Wiggins v. Smith, 123 S.Ct. 2527, 2535-2536, 2538-2539 (2003) (unreasonable  
2 application of federal law under AEDPA when state court disregards absence of evidence in record  
3 on critical issue); Taylor v. Maddox, 366 F.3d at 999, 1001; Wade v. Terhune, 202 F.3d at 1195 .  
4


5 IV. Conclusion

6 Based on the evidence contained in the exhibits accompanying the petition, this Court should  
7 find that Mr. Dennis is not competent to make a rational decision to abandon this litigation under  
8 Rees. This Court should therefore conclude that next friend standing exists and entertain the  
9 petition.

10 Respectfully submitted this 14<sup>th</sup> day of June, 2004.

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UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

TERRY JESS DENNIS, by and  
through KARLA BUTKO,  
as Next Friend,

Petitioner,

v.

E.K. McDANIEL, Warden, and  
BRIAN SANDOVAL, Attorney  
General of the State of Nevada,

Respondents.

CV-S-04-0798-PMP-RJJ

Case N

Execution Date Scheduled:  
Week Beginning July 19, 2004.

(Death Penalty Habeas Corpus Case)

MOTION FOR STAY OF EXECUTION

Petitioner hereby applies, pursuant to 28 U.S.C. § 2251, for a stay of execution of the sentence of death imposed by the Nevada courts in State v. Dennis, Washoe County Case No. CR99-0611, currently scheduled to be carried out in the week beginning July 19, 2004. This application is based upon the attached memorandum of points and authorities, and the habeas corpus petition

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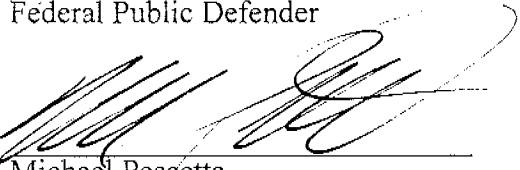
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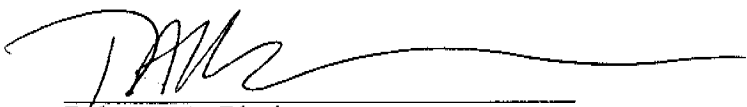
1 filed herewith.

2 DATED this 14<sup>th</sup> day of June, 2004.

3 Respectfully submitted,

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1                                    MEMORANDUM OF POINTS AND AUTHORITIES

2            Petitioner Terry Dennis, through next friend, Karla Butko seeks a stay of the execution of his  
3 sentence of death currently scheduled for the week of July 19, 2004.

4            Petitioner Terry Dennis, through next friend, Karla Butko is submitting a petition for writ of  
5 habeas corpus and request to proceed in forma pauperis on this date. An execution warrant has been  
6 issued, authorizing petitioner's execution during the week beginning July 19, 2004. See Nev. Rev.  
7 Stat. § 176.495(2) (execution to be ordered during week appointed, beginning Monday and ending  
8 Sunday of that week, and director of the Department of Prisons to designate actual date and time of  
9 execution within that week).

10           This Court has the authority to stay the execution pursuant to 28 U.S.C. § 2251.<sup>1</sup> The  
11 petitioner would, of course, be irreparably harmed by his execution before the constitutional claims  
12 to be raised in his habeas petition are resolved, and imposition of a stay of execution to allow  
13 consideration of his claims is therefore warranted. See McFarland v. Scott, 512 U.S. 849, 857-858  
14 (1994); Harris v. Vasquez, 901 F.2d 724, 727 (9th Cir. 1990) ("In considering what process is due,  
15 it is appropriate to consider the gravity of the harm to the petitioner if his execution is not stayed."  
16 citing Barefoot v. Estelle, 463 U.S. 880, 893 (1983).

17           This is a first habeas corpus proceeding, see Stewart v. Martinez-Villareal, 523 U.S. 637,  
18 643-644 (1995), to which this Court must give plenary consideration. Appointment of counsel to  
19 assist petitioner in these proceedings is mandatory. 21 U.S.C. § 848(q)(4)(B).

---

21           <sup>1</sup> The statute pertaining to a stay of state court proceedings provides, in relevant part:

22                                    A justice or judge of the United States before whom a habeas corpus  
23 proceeding is pending, may before final judgment or after final judgment of  
24 discharge, or pending appeal, stay any proceeding against the person detained in  
25 any State court or by or under the authority of any State for any matter involved in  
the habeas corpus proceeding.

26                                    After the granting of such a stay, any such proceeding in any State court or  
by or under the authority of any State shall be void.

27           28 U.S.C. § 2251.

1 [T]he right to counsel necessarily includes a right for that counsel  
2 meaningfully to research and present a defendant's habeas claims.  
3 Where this opportunity is not afforded, "[a]pproving the execution of  
a defendant before his [petition] is decided on the merits would  
clearly be improper."

4 McFarland, 512 U.S. at 858, quoting Barefoot, 463 U.S. at 889. Here, "[t]here are present  
5 substantial grounds upon which relief *might* be granted." Harris, 901 F.2d at 727 (emphasis in  
6 original). Petitioner has alleged substantial claims of ineffective assistance of counsel and numerous  
7 other arguable claims.

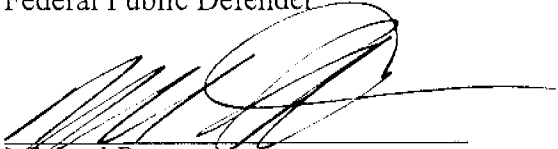
8 Under these circumstances, imposition of a stay of the execution, currently authorized to be  
9 carried out within thirty-five days from today, is necessary to allow this Court to adequately examine  
10 the grounds to be raised in the habeas petition, to preserve this Court's jurisdiction to rule upon the  
11 petition before it, and to prevent the case from becoming moot due to the petitioner's execution  
12 before relief can be granted. Otherwise, the appointment of counsel to litigate substantial federal  
13 claims under 21 U.S.C. § 848(g)(4)(B) would be rendered meaningless. See McFarland, 512 U.S.  
14 at 857.

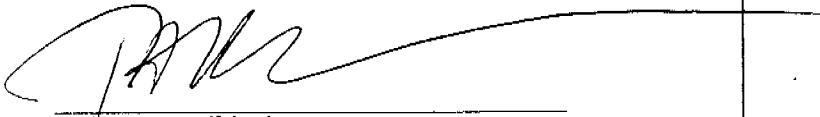
15 Accordingly, this Court should impose a stay of execution.

16 DATED this 14<sup>th</sup> day of June, 2004.

17 Respectfully submitted,

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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEVADA**

TERRY JESS DENNIS,  
  
Petitioner,  
  
vs.  
  
MICHAEL BUDGE, et al.,  
  
Respondents.

CV-S-04-0798-PMP

**MOTION TO DISMISS**

Respondents, by and through counsel, Brian Sandoval, Attorney General of the State of Nevada, move to dismiss the "petition for writ of habeas corpus" filed in the above-entitled matter. This motion is made and based on the attached points and authorities.

**STATEMENT OF THE CASE<sup>1</sup>**

Purported petitioner Terry Jess Dennis (hereinafter Dennis) was charged by information with first-degree murder with the use of a deadly weapon for the March 1999 willful, deliberate and premeditated strangulation murder of Ilona Straumanis. Exhibit 56 at 1. Dennis was evaluated by a psychiatrist, determined to be competent to stand trial, and entered a guilty plea to the charge against him. Id. Prior to accepting his guilty plea, the district court thoroughly canvassed Dennis, finding him competent to

<sup>1</sup> Reference will be made to the exhibits submitted with the purported "next-friend" petition and Respondents' exhibits. The supposed next friend's exhibits will be referred to as "Exhibit \_\_\_\_." Respondents' exhibits will be designated "Respondents' Exhibit \_\_\_\_."

1 enter a plea and that his plea was knowingly and voluntarily entered. *Id.* See *Dennis v.*  
2 *State*, 116 Nev. 1075, 1076-1081, 13 P.3d 434, 435-438 (2000). Ultimately, a three-  
3 judge panel sentenced Dennis to death. *Id.*

4 Dennis took a direct appeal to the Nevada Supreme Court. Exhibit 56 at 1. See  
5 *Dennis v. State*, 116 Nev. 1075, 1076-1081, 13 P.3d 434, 435-438 (2000). In that  
6 appeal Dennis claimed that the imposition of the death penalty where it was "solely  
7 predicated upon three (3) prior felony aggravators that were each several years old –  
8 was excessive given the facts of the case and the character of the defendant."  
9 Respondents' Exhibit 20.

10 The Nevada Supreme Court affirmed Dennis' conviction and sentence of death.  
11 Exhibit 56 at 1. *Dennis v. State*, 116 Nev. 1075, 1087, 13 P.3d 442 (2000).

12 On April 10, 2001, Dennis filed a timely petition for writ of habeas corpus (post-  
13 conviction). Exhibit 56 at 1. The district court appointed counsel. Exhibit 56 at 1-2.  
14 Counsel supplemented the petition. Exhibit 56 at 2.

15 On June 4, 2003, the state district court dismissed the petition without an  
16 evidentiary hearing. Exhibit 56 at 2. After Dennis appealed to the Nevada Supreme  
17 Court, the State moved for a remand. *Id.* The State's motion was based on letters  
18 Dennis addressed to the district court and the Washoe County District Attorney dated  
19 September 9 and 17, 2003, respectively. *Id.* In those letters, Dennis expressed his  
20 desire to withdraw his appeal to the Nevada Supreme Court and requested assistance  
21 in doing so, stating that he had shared with his counsel, Karla Butko, his desire to  
22 withdraw the appeal but Butko was "doing all she [could] to delay things." *Id.*

23 The Nevada Supreme Court granted the State's motion and remanded the matter  
24 to the state district court for further proceedings to determine Dennis's competency and  
25 the validity of any waiver of his appeal. Exhibit 56 at 2.

1 On November 7, 2003, Butko then moved the district court for permission to  
2 withdraw from representation.<sup>2</sup> Exhibit 56 at 2; Exhibit 52 at 3. Butko alleged that  
3 Dennis's desire to waive his appeal and proceed to execution was so repugnant to her  
4 that she could no longer represent Dennis. Id. On November 7, 2003, the district court  
5 granted Butko's motion and appointed replacement counsel, Scott Edwards. Exhibit 56  
6 at 2. The court then ordered a competency evaluation by a psychiatrist. Exhibit 56 at 2.

7 Dr. Thomas E. Bittker, a psychiatrist, conducted the evaluation and in a written  
8 report opined (1) Dennis "does have sufficient present ability to consult with his attorney  
9 with a reasonable degree of factual understanding"; (2) he "has a rational and factual  
10 understanding of the proceedings[,] ...is fully aware of the charges that he confronts,  
11 the implication of the sentence, and has a full understanding of what is involved in the  
12 death penalty [and] is also aware of the legal options available to him and the  
13 consequences of his not proceeding with these options"; (3) he "is currently taking  
14 medications that are reasonable and consistent with the diagnosis of bipolar disorder,  
15 and his primary psychiatric problems, alcohol, amphetamine, and cocaine dependence,  
16 are contained by virtue of the total institutional control in his life"; and (4) "[t]he  
17 medications that he is taking are not having any unusual effect on [his] ability to make  
18 decisions in behalf of his own interest, and to cooperate with counsel to participate in  
19 the court hearing." Exhibit 56 at 2. Dr. Bittker also diagnosed Dennis with a variety of  
20 other disorders including post-traumatic stress disorder, attention deficit hyperactivity  
21 disorder and mixed personality disorder with antisocial, cyclothymic borderline and  
22 schizoid features. Exhibit 56 at 3 fn. 3.. To these opinions, Dr. Bittker added:

23 [O]n the other hand, [Dennis] has sustained over the years  
24 episodes of suicidal ideation, suicide attempts, and self-  
25 destructive behavior, which heralded both the instant offense  
26 and his current legal strategy. I believe, with a reasonable  
27 degree of medical certainty, that [Dennis's] desire to both  
seek the death penalty and to refuse appeals in his behalf  
are directly a consequence of the suicidal thinking and his  
chronic depressed state, as well as his self-hatred.

28 <sup>2</sup> Respondents note that Butko omitted the motion from the exhibits she presented to this court.  
Respondents have supplied the court with that exhibit. Respondents' Exhibit 77.

1 Clearly, an alternative to consider is whether or not  
2 [Dennis's] view of himself is simply a realistic incorporation  
3 of society's view of his "monstrous" behavior. On the other  
4 hand, it is conceivable and, in my mind, likely that both the  
5 defendant's offense and his current court strategy spring  
6 from his psychiatric disorder and his substance abuse  
7 disorder, that he wishes to die and he wishes to be certain of  
8 a reasonably humane death. Consequently, the death  
9 penalty, as provided by the state, is quite congruent with  
10 both his intent and his psychiatric disorder.

11 Exhibit 56 at 3.

12 On December 4, 2003, the district court conducted a hearing at which Dennis  
13 was present with replacement counsel, Scott W. Edwards. Exhibit 56 at 3. The state  
14 district court thoroughly canvassed Dennis on the issues of his competence and waiver  
15 of rights. Exhibit 56 at 4. On December 22, 2003, the court entered a detailed, written  
16 order finding that Dennis was competent to waive his rights and to decide whether to  
17 forgo further litigation that might delay or overturn his execution and that he voluntarily,  
18 knowingly and intelligently waived his rights to pursue further relief, including his appeal  
19 with respect to his state petition for writ of habeas corpus (post-conviction). Exhibit 56  
20 at 4.

21 On February 2, 2004, Dennis filed a motion to voluntarily withdraw his appeal  
22 from the denial/dismissal of his state petition for writ of habeas corpus (post-conviction).  
23 Exhibit 56 at 4. In the motion, Dennis's counsel, Edwards, stated that Dennis  
24 consented to the voluntary withdrawal of his appeal, having had the benefit of Edward's  
25 explaining to him the legal consequences of withdrawing the appeal, including that he  
26 cannot thereafter seek to reinstate the appeal and that any issues that were or could  
27 have been brought in the appeal are forever waived. Exhibit 56 at 4.

28 On March 12, 2004, the Nevada Supreme Court dismissed Dennis's appeal.  
Exhibit 56. The Nevada Supreme Court found that substantial evidence supports the  
state district court's determination that Dennis is competent to make a rational choice to  
forgo further and possibly life-saving litigation, including the appeal to the Nevada  
Supreme Court. Exhibit 56 at 5. The Nevada Supreme Court also found that the

1 evidence likewise supports the district court's determination that Dennis's waiver of  
2 rights and decision to withdraw his appeal were voluntary, not the result of any improper  
3 influence, and are knowingly and intelligently made. Exhibit 56 at 9. The Nevada  
4 Supreme Court granted Dennis's motion to voluntarily dismiss his appeal. Exhibit 56 at  
5 9.

6 Dennis's execution has been set for July 22, 2004 at 9:00 p.m.

7 The state district court issued a warrant of execution on May 17, 2004. Exhibit  
8 57.

9 On or about June 14, 2004, more than seven (7) months after Butko sought to be  
10 and was relieved as Dennis's counsel because she disagreed with Dennis's desire to  
11 waive his appeal and proceed to execution, more than three (3) months after the  
12 Nevada Supreme Court dismissed Dennis's appeal, with absolutely no involvement by  
13 Butko in the interim, and without authority from Dennis, Butko, purporting to be a next-  
14 friend, has filed a next-friend petition for writ of habeas corpus in this court.<sup>3</sup> In the  
15 petition, rather than specifically delineate the claims sought to be raised, Butko stated,  
16 "Petitioner incorporates the claims and factual allegations raised in the state habeas  
17 petition and briefing on appeal from denial of the state habeas petition, Exs. 26, 27 43,  
18 as if fully set forth herein." Although the officious intermeddlers, the federal public  
19 defender and Butko, have filed the action and are both licensed attorneys, they seek the  
20 appointment of counsel, purportedly on behalf of Dennis.

21 Respondents move to dismiss the petition.

#### 22 STATEMENT OF FACTS

23 The facts that control this action are those made by the Nevada courts. Those  
24 facts are found, without limitation, predominantly in Exhibits 8, 9, 23, 24, 25, 40, 52, 56  
25 and 58. Respondents adopt the factual findings and recitations therein and incorporate  
26 them herein as if set out in full.

27  
28 <sup>3</sup> No court has heard from Butko regarding Dennis until this eleventh hour "action" was presented to the  
federal district court barely a month before Dennis's scheduled execution.



## DENIAL OF FACTUAL ALLEGATIONS

Respondents deny each and every factual allegation contained in the purported "next-friend" federal habeas petition save and except those expressly found to exist by a Nevada court of competent jurisdiction.

### ARGUMENT

#### A. Karla Butko Has No Standing To Bring This Action. Therefore, The Action Should Be Dismissed.

In *Whitmore v. Arkansas*, 495 U.S. 149, 164 (1990), the Supreme Court held that a next-friend federal habeas action requires the showing of incompetence or other disability and that the next friend's are dedicated to the interests of the petitioner by a significant relationship.

The Court stated:

A "next friend" does not himself become a party to the habeas action in which he participates, but simply pursues the cause on behalf of the detained person, who remains the real party in interest. *Morgan v. Potter*, 157 U.S. 195, 198, 15 S.Ct. 590, 591, 39 L.Ed. 670 (1895); *Nash ex rel. Hashimoto v. MacArthur*, 87 U.S.App.D.C. 268, 269-270, 184 F.2d 606, 607-608 (1950), cert. denied, 342 U.S. 838, 72 S.Ct. 64, 96 L.Ed. 634 (1951). Most important for present purposes, "next friend" standing is by no means granted automatically to whomever seeks to pursue an action on behalf of another. Decisions applying the habeas corpus statute have adhered to at least two firmly rooted prerequisites for "next friend" standing. First, a "next friend" must provide an adequate explanation - such as inaccessibility, mental incompetence, or other disability - why the real party in interest cannot appear on his own behalf to prosecute the action. *Wilson v. Lane*, 870 F.2d 1250, 1253 (CA7 1989), cert. pending, No. 89-81; *Smith ex rel. Missouri Public Defender Comm'n v. Armontrout*, 812 F.2d 1050, 1053 (CA8), cert. denied, 483 U.S. 1033, 107 S.Ct. 3277, 97 L.Ed.2d 781 (1987); *Weber v. Garza*, 570 F.2d 511, 513-514 (CA5 1978). Second, the "next friend" must be truly dedicated to the best interests of the person on whose behalf he seeks to litigate, see, e.g. *Morris v. United States*, 399 F.Supp. 720, 722 (ED Va. 1975), and it has been further suggested that a "next friend" must have some significant relationship with the real party in interest. *Davis v. Austin*, 492 F.Supp. 273, 275-276 (ND Ga. 1980) (minister and first cousin of prisoner denied "next friend" standing). The burden is on the "next friend" clearly to establish the propriety of his status and thereby justify the jurisdiction of

the court. *Smith, supra*, at 1053; *Groseclose ex rel. Harries v. Dutton*, 594 F.Supp. 949, 952 (MD Tenn. 1984).

These limitations on the "next friend" doctrine are driven by the recognition that "[i]t was not intended that the writ of habeas corpus should be availed of, as a matter of course, by intruders or uninvited meddlers, styling themselves next friends." *United States ex rel. Bryant v. Houston*, 273 F.915, 916 (CA2 1921); see also *Rosenberg v. United States*, 346 U.S. 273, 291-292, 73 S.Ct. 1152, 1161-1162, 97 L.Ed. 1607 (1953) (Jackson, J., concurring with five other Justices) (discountenancing practice of granting "next friend" standing to one who was a stranger to the detained persons and their case and whose intervention was unauthorized by the prisoners' counsel). Indeed, if there were no restriction on "next friend" standing in federal courts, the litigant asserting only a generalized interest in constitutional governance could circumvent the jurisdictional limits of Art. III simply by assuming the mantle of "next friend."

*Whitmore*, 495 U.S. at 163-164.

As noted above, one necessary condition for "next friend" standing in federal court is a showing by the proposed "next friend" that the real party in interest is unable to litigate his own cause due to mental incapacity, lack of access to the court, or other similar disability. *Whitmore v. Arkansas*, 495 U.S. at 165. See *Demosthenes v. Baal*, 495 U.S. 731, 737 (1990) (state competency determinations entitled to deference). That prerequisite for "next friend" standing is not satisfied where an evidentiary hearing shows that the defendant has given a knowing, intelligent, and voluntary waiver of his right to proceed, and his access to court is otherwise unimpeded. *Id.* The Supreme Court has held similarly in a previous Nevada case.

Conclusory allegations are insufficient to establish standing. *Brewer v. Lewis*, 989 F.2d 1021, 1026 (9th Cir. 1993); *Massie v. Woodford*, 244 F.3d 1192, 1197 (9th Cir. 2001).

The factual findings by the Nevada state courts which include findings of Dennis's competency are presumptively correct. 28 U.S.C. § 2254(e)(1). *Demosthenes v. Baal*, 494 U.S. 731, 737 (1990). Those presumptively correct factual findings are found without limitations predominantly in Exhibits 8, 9, 23, 24, 25, 40, 52, 56 and 58, and elsewhere in the record. They are adopted by Respondents as if set out in full

1 herein. The Nevada courts' findings that Dennis is competent are presumptively  
2 correct. 28 U.S.C. § 2254(e)(1). *Demosthenes v. Baal*, 495 U.S. 731, 734, 737 (1990).  
3 The proposed next friend has the burden of rebutting those factual findings by clear and  
4 convincing evidence. 28 U.S.C. § 2254(e)(1).

5 Even in the absence of an express finding of competence by the state courts, a  
6 defendant who alleges insanity in his habeas corpus petition may be presumed to be  
7 competent, since the trial court judge would not have otherwise allowed the trial to  
8 proceed. 28 U.S.C. § 2254(e)(1). *Ford v. Wainwright*, 477 U.S. 399, 425-426 (1986).

9 **1. Butko has no standing to bring this action because she has**  
10 **not met her burden of showing that Dennis is incompetent.**

11 Dennis is presumed to be competent. The Nevada courts have found Dennis to  
12 be competent to waive further proceedings. Exhibits 52 and 56. Those factual findings  
13 are presumptively correct. 28 U.S.C. § 2254(e)(1). *Demosthenes v. Baal*, 495 U.S.  
14 731, 734, 737 (1990). Butko has the burden of rebutting those factual findings by clear  
15 and convincing evidence. 28 U.S.C. § 2254(e)(1). Butko has the burden of clearly  
16 proving that Dennis is incompetent. *Whitmore v. Arkansas*, 495 U.S. at 165.

17 Butko has presented no declaration or evidence apart from that which was  
18 presented to the state district court that would amount to meaningful evidence that  
19 Dennis is not currently competent. Butko does not show that Dennis's decision to forgo  
20 further proceedings is not "the product of a free and deliberate choice." *Comer v.*  
21 *Stewart*, 215 F.3d 910, 917 (9th Cir. 2000). Therefore, Butko has no standing.

22 Past mental illness is not enough to upset a current determination that habeas  
23 corpus petitioner is competent, as will bar a non-party from being granted standing to  
24 appear as "next friend" of petitioner. *Massie v. Woodford*, 244 F.3d 1192 (9th Cir.  
25 2001); *Brewer v. Lewis*, 989 F.2d 1021, 1025, 1026 & n.6 (9th Cir. 1993) (opinions by  
26 doctors who never met petitioner and by physician who examined and found him  
27 competent several years before but speculates, based on information not available at  
28 that time, that condition may have deteriorated is inconclusive and insufficient to

1 outweigh substantial evidence demonstrating competence and also concluding that  
2 when four experts who had examined petitioner determined he suffered from personality  
3 disorder yet all agreed he was competent, neither petitioner's long-standing mental  
4 problems, nor even his current belief that after his execution he and the girlfriend he  
5 murdered would live together on another planet, constitute "meaningful evidence" that  
6 petitioner was suffering from a mental disease, disorder, or defect that substantially  
7 affected his capacity to make an intelligent decision); *Vargas v. Lambert*, 159 F.3d  
8 1161, 1170-71 (9th Cir.) (staying execution because next friend presented meaningful  
9 evidence that condemned was suffering from a mental disease, disorder, or defect that  
10 substantially affected his capacity to make rational decisions; condemned was currently  
11 being medicated with psychotropics, sleeping sixteen hours a day, and one expert  
12 diagnosed condemned as psychotic), *stay vacated by Lambert v. Vargas*, 525 U.S. 925,  
13 (1998); *Lonchar v. Zant*, 978 F.2d 637 (11th Cir. 1992), and *Rumbaugh v. Procnier*,  
14 753 F.2d 395 (5th Cir. 1985), (defendant in both cases was suffering from a mental  
15 disorder but was able to rationally choose between his options of pursuing an appeal or  
16 waiving further legal rights.)

17 Furthermore, the Nevada Courts' determinations that Dennis competently waived  
18 his rights to further appeal are presumptively correct. Exhibits 52 and 56. 28 U.S.C. §  
19 2254(e)(1). The state courts relied on the proper standard. Exhibit 56. *Franklin v.*  
20 *Francis*, 144 F.3d 429 (6th Cir. 1998). Therefore, pursuant to 28 U.S.C. § 2254(d),  
21 because the Nevada Supreme Court decision was not contrary to or did not involve an  
22 unreasonable application of clearly established Federal law, as determined by the  
23 Supreme Court of the United States, this court is bound by the determination of the  
24 Nevada Supreme Court that Dennis was competent to waive further proceedings.  
25 Because he is competent, the applicants herein do not have standing to pursue a writ of  
26 habeas corpus on Dennis's behalf.

27 ....

28 ....

2. Even if Dennis is not competent, Butko is not truly dedicated to Dennis's best interests.

Article III of the United States Constitution requires that a plaintiff have "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691 (1962). The significant-relationship requirement goes a long way towards ensuring the existence of "such a personal stake" in next friend standing cases as well. One who has some significant relationship with the real party in interest is much more likely to experience the real party's injury in fact in a personal way. One with no significant relationship by contrast, is much more likely to be utilizing the real party's injury as an occasion for entry into policy-laden proceedings of all sorts. *Hamdi v. Rumsfeld*, 294 F.3d 598, 605 (4th Cir. 2002).

"[H]owever worthy and high-minded the motives of "next friends" may be, they inevitably run the risk of making the actual defendant a pawn to be manipulated on a chessboard larger than his own case." *Lenhard v. Wolff*, 443 U.S. 1306, 1312, 100 S.Ct. 3 (1979).

Butko's opposition to the death penalty does not give her standing. The logical conclusion of a decision supporting standing on that basis would be that any person who opposes the death penalty or the enforcement of the death penalty would have next friend standing. That, obviously, is absurd. Just as obviously, Butko's opposition to Dennis's decision does not give her standing.

The fact that Butko withdrew from representing Dennis because she found his desire to cease further litigation and accept his punishment does not satisfy the requirement the next friend be dedicated to Dennis's best interests. Frankly, a competent litigant is the captain of his own ship and he, not his attorney, is the one who decides whether or not to continue to litigate. The Supreme Court recognized that this is true even in capital litigation. *Whitmore v. Arkansas*, 495 U.S. 149 (1990). Where the

1 real party in interest explicitly makes a competent decision to forgo further proceedings,  
2 "next friends" who wish to proceed contrary to the real party in interests wishes have no  
3 standing. *Davis v. Austin*, 492 F.Supp. 273, 275-276 (N.D.Ga. 1980).

4 Butko has filed the petition because she perceives that there are rights to be  
5 vindicated. There is a difference between being "uninvited because you are meant to  
6 be excluded" and being "uninvited but welcome." In this case, the evidence shows that  
7 Dennis affirmatively objects to Butko's efforts. No friend or relative has come forth on  
8 Dennis's behalf. There is no evidence that Butko sought authorization to bring the  
9 action on Dennis's behalf or even obtained implied authority to do so. To allow Butko's  
10 appearance would violate the second prong of the *Whitmore-Massie* test.

11 Butko has no substantial relationship with Dennis. Butko abandoned her client  
12 for her own personal beliefs. She wanted to advance her own agenda rather than her  
13 client's. Butko was delaying the post-conviction litigation as much as she could.  
14 Exhibits 47, 56 at 2. Clearly, that and the fact that Butko failed to supply this court with  
15 the documentation showing that she voluntarily absented herself from further  
16 representation of Dennis is additional evidence that Butko, rather than advancing  
17 Dennis's interests, is bent on advancing her own. Butko fails in this prong. *Hauser v.*  
18 *Moore*, 223 F.3d 1316, 1322 (11th Cir. 2000).

19 **3. Butko does not have a significant relationship with Dennis**  
20 **and, therefore, is not a "next friend." *Whitmore v. Arkansas*,**  
21 **495 U.S. at 163-164, 110 S.Ct. at 1727.**

22 Butko does not claim to be a relative of Dennis or even a friend to Dennis. Butko  
23 apparently does claim to be an attorney who formerly represented Dennis. The next  
24 friend must show some relationship or other evidence that would suggest that the next  
25 friend is truly dedicated to the interests of the real party in interest. The Eleventh Circuit  
26 Court of Appeals in *Ford v. Haley*, 195 F.3d 603, 605 & n.1 (11th Cir. 1999), *Hauser ex*  
27 *rel. Crawford v. Moore*, 223 F.3d 1316, 1322 (11t Cir. 2000), has concluded that "some  
28 significant relationship" does exist when the would-be next friend has served in a prior

1 proceeding as counsel for the real party in interest and did so with his consent.  
2 However, the circumstances presented in this matter are markedly different from those  
3 presented in *Ford and Hauser*.

4 Butko found Dennis's decision not to continue to pursue the appeal from the  
5 denial of his state petition for writ of habeas corpus (post-conviction) so repugnant that  
6 she moved to be relieved as his attorney. Exhibits 52 at 3; 56 at 2. Butko terminated  
7 the attorney-client relationship. Exhibits 52 and 56. The logical extension of granting  
8 such a person next friend status would be that any attorney who withdraws from  
9 representation of a client because that attorney does not accept the decision(s) of his  
10 client to cease litigation has next friend standing. That, of course, is absurd. Butko's  
11 motivation is to promote her personal opposition to her former client's decision and to  
12 coerce her former client to follow her wishes rather than his.

13 The transcript of the hearing and Dennis's letter's disclose that he did not  
14 consent to Butko's continued representation. Exhibits 42, 47, 52 and 56.

15 It is significant to note that the last attorney to represent Dennis with his consent,  
16 Scott Edwards, has not made any next friend application.

### 17 CONCLUSION

18 This action is brought in bad faith, without basis in law or in fact, by officious  
19 intermeddlers whose only desire is to advance their own agenda, to frustrate or delay by  
20 whatever means possible the execution of sentence lawfully imposed in state court.  
21 This action is brought by people who simply wish to impose their own views on a  
22 competent prisoner who does not want to pursue further action. Butko has no standing  
23 to bring the action. The Nevada state court's findings of competency are binding on this  
24 court. 28 U.S.C. § 2254(e)(1). It is the disingenuous for an attorney to claim that she is  
25 the "next friend" of a convicted person when the attorney terminated her relationship  
26 with her client because of her personal beliefs. Given the extremely limited time that  
27 this court gave Respondents to respond, Respondents have addressed only the issue  
28 of standing in this motion to dismiss. Respondents reserve the right to move to dismiss

1 on other grounds and/or answer the petition should this court deny Respondents'  
2 motion.

3 RESPECTFULLY SUBMITTED this 28<sup>th</sup> day of June 2004.

4 BRIAN SANDOVAL  
5 Attorney General

6 By:   
7 

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Office of the Attorney General of the State of Nevada and that on this \_\_\_\_\_ day of June 2004, I served a copy of the foregoing MOTION TO DISMISS, by mailing a true copy, postage prepaid, to:

John Lambrose  
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\_\_\_\_\_  
An Employee of the Office  
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JUN 23 2004

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CV-S-04-0798-PMP

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- EXHIBIT 2: Waiver of Preliminary Examination, *State of Nevada v. Terry Jess Dennis*, Case No. RJC 97,670, In the Justice Court of the Reno Township, State of Nevada, filed March 29, 1999.
- EXHIBIT 3: Court Minutes, *State of Nevada v. Terry Jess Dennis*, Case No. CR99-0611, In the Second Judicial District Court, State of Nevada, dated April 16, 1999 – December 4, 2003.
- EXHIBIT 4: Stipulation Regarding Arraignment, *State of Nevada v. Terry Jess Dennis*, Case No. CR99-0611, In the Second Judicial District Court, State of Nevada, filed March 29, 1999.
- EXHIBIT 5: Request, Agreement and Order for Pre-Trial Reciprocal Discovery, *State of Nevada v. Terry Jess Dennis*, Case No. CR99-0611, In the Second Judicial District Court, State of Nevada, filed April 2, 1999.
- EXHIBIT 6: Order Regarding Arraignment, *State of Nevada v. Terry Jess Dennis*, Case No. CR99-0611, In the Second Judicial District Court, State of Nevada, filed April 2, 1999.
- EXHIBIT 7: Warrant of Execution, *State of Nevada v. Terry Jess Dennis*, Case No. CR99-0611, In the Second Judicial District Court, State of Nevada, filed July 20, 1999.

- 1 EXHIBIT 8: Order of Committal, *State of Nevada v. Terry Jess Dennis*, Case No.  
2 CR99-0611, In the Second Judicial District Court, State of Nevada, filed  
3 July 20, 1999.
- 4 EXHIBIT 9: Order of Execution, *State of Nevada v. Terry Jess Dennis*, Case No.  
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8 *Jess Dennis*, Case No. CR99-0611, In the Second Judicial District Court,  
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- 10 EXHIBIT 11: Notice of Appeal, *State of Nevada v. Terry Jess Dennis*, Case No. CR99-  
11 0611, In the Second Judicial District Court, State of Nevada, filed August  
12 3, 1999.
- 13 EXHIBIT 12: Case Appeal Statement, *State of Nevada v. Terry Jess Dennis*, Case No.  
14 CR99-0611, In the Second Judicial District Court, State of Nevada, filed  
15 August 3, 1999.
- 16 EXHIBIT 13: Affidavit of Compliance with SCR 250 (3) (b), *State of Nevada v. Terry*  
17 *Jess Dennis*, Case No. CR99-0611, In the Second Judicial District Court,  
18 State of Nevada, filed August 3, 1999.
- 19 EXHIBIT 14: Transmittal Certificate, *State of Nevada v. Terry Jess Dennis*, Case No.  
20 CR99-0611, In the Second Judicial District Court, State of Nevada, filed  
21 August 4, 1999.
- 22 EXHIBIT 15: Docketing Statement Criminal Appeals, *Terry Jess Dennis v. State of*  
23 *Nevada*, Case No. 34632, In the Supreme Court of the State of Nevada,  
24 filed August 13, 1999.
- 25 EXHIBIT 16: Order Setting Briefing Schedule, *Terry Jess Dennis v. State of Nevada*,  
26 Case No. 34632, In the Supreme Court of the State of Nevada, filed  
27 August 24, 1999.
- 28 EXHIBIT 17: Motion for Extension of Time to File Opening Brief, *Terry Jess Dennis v.*  
*State of Nevada*, Case No. 34632, In the Supreme Court of the State of  
Nevada, filed October 18, 1999.
- EXHIBIT 18: Order Granting Motion, *Terry Jess Dennis v. State of Nevada*, Case No.  
34632, In the Supreme Court of the State of Nevada, filed October 26,  
1999.
- EXHIBIT 19: Order Scheduling Oral Argument, *Terry Jess Dennis v. State of Nevada*,  
Case No. 34632, In the Supreme Court of the State of Nevada, filed  
February 10, 2000.
- EXHIBIT 20: Appellant's Opening Brief, *Terry Jess Dennis v. State of Nevada*, Case  
No. 34632, In the Supreme Court of the State of Nevada, filed October 26,  
1999.
- EXHIBIT 21: Respondent's Answering Brief, *Terry Jess Dennis v. State of Nevada*,  
Case No. 34632, In the Supreme Court of the State of Nevada, filed  
December 17, 1999.

- 1 EXHIBIT 22: Appellant's Reply Brief, *Terry Jess Dennis v. State of Nevada*, Case No.  
2 34632, In the Supreme Court of the State of Nevada, filed January 24,  
2000.
- 3 EXHIBIT 23: Petition for Rehearing, *Terry Jess Dennis v. State of Nevada*, Case No.  
4 34632, In the Supreme Court of the State of Nevada, filed December 26,  
2000.
- 5 EXHIBIT 24: Transmittal Certificate, *State of Nevada v. Terry Jess Dennis*, Case No.  
6 CR99-0611, In the Second Judicial District Court, State of Nevada, filed  
January 27, 2000.
- 7 EXHIBIT 25: Order Denying Rehearing, *Terry Jess Dennis v. State of Nevada*, Case  
8 No. 34632, In the Supreme Court of the State of Nevada, filed January 23,  
2001.
- 9 EXHIBIT 26: Clerk's Certificate, *Terry Jess Dennis v. State of Nevada*, Case No.  
10 34632, In the Supreme Court of the State of Nevada, filed February 9,  
2001.
- 11 EXHIBIT 27: Order Denying Rehearing, *Terry Jess Dennis v. State of Nevada*, Case  
12 No. 34632, In the Supreme Court of the State of Nevada, filed February 9,  
2001.
- 13 EXHIBIT 28: Remittitur, *Terry Jess Dennis v. State of Nevada*, Case No. 34632, In the  
14 Supreme Court of the State of Nevada, filed February 20, 2001.
- 15 EXHIBIT 29: Application for Setting, *State of Nevada v. Terry Jess Dennis*, Case No.  
16 CR99-0611, In the Second Judicial District Court, State of Nevada, filed  
March 2, 2001.
- 17 EXHIBIT 30: Application for Leave to Proceed in Forma Pauperis and Request  
18 Appointment of Counsel, *Terry Dennis v. Don Helling, et al.*, Case No.  
CR99-0611, In the Second Judicial District Court, State of Nevada, filed  
April 9, 2001.
- 19 EXHIBIT 31: Execution to be Scheduled on April 11, 2001, *Terry Dennis v. Don Helling,*  
20 *et al.*, Case No. CR99-0611, In the Second Judicial District Court, State of  
Nevada, filed April 9, 2001.
- 21 EXHIBIT 32: Proper Person Request for Appointment of Post-Conviction Counsel,  
22 *Terry Dennis v. Don Helling, et al.*, Case No. CR99-0611, In the Second  
Judicial District Court, State of Nevada, filed April 9, 2001.
- 23 EXHIBIT 33: Warrant of Execution, *State of Nevada v. Terry Jess Dennis*, Case No.  
24 CR99-0611, In the Second Judicial District Court, State of Nevada, filed  
April 12, 2001.
- 25 EXHIBIT 34: Order, *Terry Dennis v. Don Helling, et al.*, Case No. CR99-0611, In the  
26 Second Judicial District Court, State of Nevada, filed April 12, 2001.
- 27 EXHIBIT 35: Order, *Terry Dennis v. Don Helling, et al.*, Case No. CR99-0611, In the  
28 Second Judicial District Court, State of Nevada, filed April 12, 2001.

- 1 EXHIBIT 36: Order to Produce Prisoner, *State of Nevada v. Terry Jess Dennis*, Case  
2 No. CR99-0611, In the Second Judicial District Court, State of Nevada,  
3 filed March 13, 2001.
- 4 EXHIBIT 37: Application for Order to Produce Prisoner, *State of Nevada v. Terry Jess*  
5 *Dennis*, Case No. CR99-0611, In the Second Judicial District Court, State  
6 of Nevada, filed March 6, 2001.
- 7 EXHIBIT 38: Order, *Terry Dennis v. Don Helling, et al.*, Case No. CR99-0611, In the  
8 Second Judicial District Court, State of Nevada, filed April 12, 2001.
- 9 EXHIBIT 39: Order, *Terry Dennis v. Don Helling, et al.*, Case No. CR99-0611, In the  
10 Second Judicial District Court, State of Nevada, filed April 25, 2001.
- 11 EXHIBIT 40: Transcript of Proceeding, *State of Nevada v. Terry Jess Dennis*, Case No.  
12 CR99-0611, In the Second Judicial District Court, State of Nevada, dated  
13 April 11, 2001.
- 14 EXHIBIT 41: Motion for Enlargement of Time to File Response to Petition and  
15 Supplemental Petition for Writ of Habeas Corpus (Post-Conviction), *Terry*  
16 *Jess Dennis v. The State of Nevada*, Case No. CR99-0611, In the Second  
17 Judicial District Court, State of Nevada, filed May 29, 2001.
- 18 EXHIBIT 42: Motion for Enlargement of Time in which to File Supplemental Petition for  
19 Writ of Habeas Corpus (Post-Conviction); Request that Briefing Schedule  
20 be Determined by the Court, *Terry Dennis v. Don Helling, et al.*, Case No.  
21 CR99-0611, In the Second Judicial District Court, State of Nevada, filed  
22 June 21, 2001.
- 23 EXHIBIT 43: Ex Parte Motion for Order Allowing Interim Payment of Attorney's Fees  
24 and Costs to Appointed Counsel (Death Penalty Litigation), *Terry Dennis*  
25 *v. State of Nevada*, Case No. CR99-0611, In the Second Judicial District  
26 Court, State of Nevada, filed August 31, 2001.
- 27 EXHIBIT 44: Order Approving Interim Fees and Costs of Court-Appointed Attorney,  
28 *Terry Dennis v. State of Nevada*, Case No. CR99-0611, In the Second  
Judicial District Court, State of Nevada, filed September 11, 2001.
- EXHIBIT 45: Ex Parte Motion for Order Allowing Interim Payment of Attorney's Fees  
and Costs to Appointed Counsel (Death Penalty Litigation), *Terry Dennis*  
*v. State of Nevada*, Case No. CR99-0611, In the Second Judicial District  
Court, State of Nevada, filed February 20, 2002.
- EXHIBIT 46: Order Approving Fees and Costs of Court-Appointed Attorney, *Terry*  
*Dennis v. State of Nevada*, Case No. CR99-0611, In the Second Judicial  
District Court, State of Nevada, filed February 28, 2002.
- EXHIBIT 47: Application for Setting, *Terry Jess Dennis v. State of Nevada*, Case No.  
CR99-0611, In the Second Judicial District Court, State of Nevada, filed  
March 5, 2002.
- EXHIBIT 48: Ex Parte Application for Order to Produce Prisoner, *Terry Dennis v. State*  
*of Nevada*, Case No. CR99-0611, In the Second Judicial District Court,  
State of Nevada, filed March 6, 2002.

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Reno, NV 89511

- 1 EXHIBIT 49: Order to Produce Prisoner, *Terry Dennis v. State of Nevada*, Case No.  
2 CR99-0611, In the Second Judicial District Court, State of Nevada, filed  
March 11, 2002.
- 3 EXHIBIT 50: Return, *Terry Dennis v. Don Helling*, Case No. CR99-0611, In the Second  
4 Judicial District Court, State of Nevada, filed March 19, 2002.
- 5 EXHIBIT 51: Ex Parte Motion for Order Allowing Interim Payment of Attorney's Fees  
6 and Costs to Appointed Counsel (Death Penalty Litigation), *Terry Dennis*  
*v. State of Nevada*, Case No. CR99-0611, In the Second Judicial District  
Court, State of Nevada, filed May 22, 2002.
- 7 EXHIBIT 52: Addendum to Ex Parte Motion for Order Allowing Interim Payment of  
8 Attorney's Fees and Costs to Appointed Counsel (Death Penalty  
Litigation), *Terry Dennis v. State of Nevada*, Case No. CR99-0611, In the  
9 Second Judicial District Court, State of Nevada, filed May 24, 2002.
- 10 EXHIBIT 53: Order Approving Fees and Costs of Court-Appointed Attorney, *Terry*  
*Dennis v. State of Nevada*, Case No. CR99-0611, In the Second Judicial  
11 District Court, State of Nevada, filed May 28, 2002.
- 12 EXHIBIT 54: Request for Submission of Motion, *Terry Dennis v. State of Nevada*, Case  
13 No. CR99-0611, In the Second Judicial District Court, State of Nevada,  
filed May 29, 2002.
- 14 EXHIBIT 55: Request for Submission, *Terry Dennis v. State of Nevada*, Case No.  
15 CR99-0611, In the Second Judicial District Court, State of Nevada, filed  
September 6, 2002.
- 16 EXHIBIT 56: Motion for Enlargement of Time in which to File Supplemental Brief on  
Ring v. Arizona, *Terry Dennis v. Don Helling*, Case No. CR99-0611, In the  
17 Second Judicial District Court, State of Nevada, filed September 11, 2002.
- 18 EXHIBIT 57: Order, *Terry Dennis v. State of Nevada*, Case No. CR99-0611, In the  
Second Judicial District Court, State of Nevada, filed September 25, 2002.
- 19 EXHIBIT 58: Request for Submission, *Terry Dennis v. State of Nevada*, Case No.  
20 CR99-0611, In the Second Judicial District Court, State of Nevada, filed  
October 2, 2002.
- 21 EXHIBIT 59: Ex Parte Motion for Order Allowing Interim Payment of Attorney's Fees  
22 and Costs to Appointed Counsel (Death Penalty Litigation), *Terry Dennis*  
*v. State of Nevada*, Case No. CR99-0611, In the Second Judicial District  
23 Court, State of Nevada, filed November 14, 2002.
- 24 EXHIBIT 60: Order Approving Fees and Costs of Court-Appointed Attorney, *Terry*  
*Dennis v. State of Nevada*, Case No. CR99-0611, In the Second Judicial  
25 District Court, State of Nevada, filed November 19, 2002.
- 26 EXHIBIT 61: Application for Setting, *Terry Dennis v. State of Nevada*, Case No. CR99-  
27 0611, In the Second Judicial District Court, State of Nevada, filed  
November 27, 2002.
- 28

- 1 EXHIBIT 62: Request for Submission, *Terry Dennis v. State of Nevada*, Case No.  
2 CR99-0611, In the Second Judicial District Court, State of Nevada, filed  
January 13, 2003.
- 3 EXHIBIT 63: Request for Submission, *Terry Dennis v. State of Nevada*, Case No.  
4 CR99-0611, In the Second Judicial District Court, State of Nevada, filed  
April 28, 2003.
- 5 EXHIBIT 64: Application for Order to Produce Prisoner, *Terry Dennis v. State of*  
6 *Nevada*, Case No. CR99-0611, In the Second Judicial District Court, State  
of Nevada, filed May 6, 2003.
- 7 EXHIBIT 65: Order to Produce Prisoner, *Terry Dennis v. State of Nevada*, Case No.  
8 CR99-0611, In the Second Judicial District Court, State of Nevada, filed  
May 6, 2003.
- 9 EXHIBIT 66: Order, *Terry Dennis v. State of Nevada*, Case No. CR99-0611, In the  
10 Second Judicial District Court, State of Nevada, filed June 4, 2003.
- 11 EXHIBIT 67: Case Appeal Statement, *The State of Nevada v. Terry Jess Dennis*, Case  
12 No. CR99-0611, In the Second Judicial District Court, State of Nevada,  
filed June 25, 2003.
- 13 EXHIBIT 68: Certificate of Transmittal, *The State of Nevada v. Terry Jess Dennis*, Case  
14 No. CR99-0611, In the Second Judicial District Court, State of Nevada,  
filed June 26, 2003.
- 15 EXHIBIT 69: Receipt for Documents, *Terry Jess Dennis v. The State of Nevada*, Case  
16 No. 41664, In the Supreme Court of the State of Nevada, filed July 1,  
2003.
- 17 EXHIBIT 70: Motion to File Late Docketing Statement, *Terry Jess Dennis v. The State*  
18 *of Nevada*, Case No. 41664, In the Supreme Court of the State of Nevada,  
filed July 29, 2003.
- 19 EXHIBIT 71: Order Granting Motion, *Terry Jess Dennis v. The State of Nevada*, Case  
20 No. 41664, In the Supreme Court of the State of Nevada, filed August 1,  
2003.
- 21 EXHIBIT 72: Docketing Statement Criminal Appeals, *Terry Jess Dennis v. The State of*  
22 *Nevada*, Case No. 41664, In the Supreme Court of the State of Nevada,  
filed August 1, 2003.
- 23 EXHIBIT 73: Opposition to Motion for Remand & to Suspend Briefing Schedule, *Terry*  
24 *Jess Dennis v. The State of Nevada*, Case No. 41664, In the Supreme  
Court of the State of Nevada, filed October 3, 2003.
- 25 EXHIBIT 74: Ex Parte Motion for Order Allowing Interim Payment of Attorney's Fees  
26 and Costs to Appointed Counsel (Death Penalty Litigation), *Terry Dennis*  
*v. State of Nevada*, Case No. CR99-0611, In the Second Judicial District  
27 Court, State of Nevada, filed October 13, 2003.  
28

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- 1 EXHIBIT 75: Order Approving Interim Fees and Costs to Appointed Counsel (Death  
2 Penalty Litigation), *Terry Dennis v. State of Nevada*, Case No. CR99-  
3 0611, In the Second Judicial District Court, State of Nevada, filed October  
4 16, 2003.
- 5 EXHIBIT 76: Application for Setting, *Terry Jess Dennis v. State of Nevada*, Case No.  
6 CR99-0611, In the Second Judicial District Court, State of Nevada, filed  
7 October 30, 2003.
- 8 EXHIBIT 77: Motion to Withdraw as Counsel of Record, *Terry Jess Dennis v. State of*  
9 *Nevada*, Case No. CR99-0611, In the Second Judicial District Court, State  
10 of Nevada, filed November 7, 2003.
- 11 EXHIBIT 78: Transcript of Proceedings Post Conviction, *Terry Jess Dennis v. State of*  
12 *Nevada*, Case No. CR99-0611, In the Second Judicial District Court, State  
13 of Nevada, dated November 17, 2003.
- 14 EXHIBIT 79: Ex Parte Motion for Order Allowing Payment of Attorney's Fees and Costs  
15 to Appointed Counsel & Affidavit of Counsel (Post-Conviction Petition for  
16 Writ of Habeas Corpus) (Death Penalty Case), *Terry Jess Dennis v. The*  
17 *State of Nevada*, Case No. CR99-0611, In the Second Judicial District  
18 Court, State of Nevada, filed December 12, 2003.
- 19 EXHIBIT 80: Order Approving Fees of Court-Appointed Attorneys (Death Penalty  
20 Case), *Terry Jess Dennis v. State of Nevada*, Case No. CR99-0611, In the  
21 Second Judicial District Court, State of Nevada, filed December 15, 2003.
- 22 EXHIBIT 81: Order, *Terry Jess Dennis v. State of Nevada*, Case No. CR99-0611, In the  
23 Second Judicial District Court, State of Nevada, filed December 22, 2003.
- 24 EXHIBIT 82: Order, *Terry Jess Dennis v. State of Nevada*, Case No. CR99-0611, In the  
25 Second Judicial District Court, State of Nevada, filed December 22, 2003.
- 26 EXHIBIT 83: Motion to Substitute as Counsel on Appeal, *Terry Jess Dennis v. The*  
27 *State of Nevada*, Case No. 41664, In the Supreme Court of the State of  
28 Nevada, filed January 23, 2004.
- EXHIBIT 84: Order Granting Motion, *Terry Jess Dennis v. The State of Nevada*, Case  
No. 41664, In the Supreme Court of the State of Nevada, filed January 27,  
2004.
- EXHIBIT 85: Motion for Leave to Appear as Amicus Curiae, *Terry Jess Dennis v. The*  
*State of Nevada*, Case No. 41664, In the Supreme Court of the State of  
Nevada, filed January 27, 2004.
- EXHIBIT 86: Ex Parte Motion for Order Allowing Payment of Attorney's Fees and Costs  
to Appointed Counsel & Affidavit of Counsel (Post-Conviction Petition for  
Writ of Habeas Corpus) (Death Penalty Case), *Terry Jess Dennis v. The*  
*State of Nevada*, Case No. CR99-0611, In the Second Judicial District  
Court, State of Nevada, filed March 11, 2004.

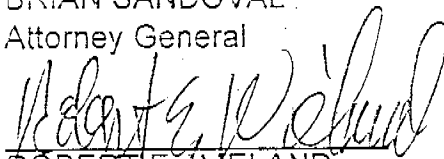


- 1 EXHIBIT 87: Order, *Terry Jess Dennis v. The State of Nevada*, Case No. CR99-0611,  
2 In the Second Judicial District Court, State of Nevada, filed March 16,  
3 2004.
- 4 EXHIBIT 88: Order Approving Fees Court-Appointed Attorneys (Death Penalty Case),  
5 *Terry Jess Dennis v. The State of Nevada*, Case No. CR99-0611, In the  
6 Second Judicial District Court, State of Nevada, filed March 18, 2004.
- 7 EXHIBIT 89: Application for Setting, *The State of Nevada v. Terry Jess Dennis*, Case  
8 No. CR99-0611, In the Second Judicial District Court, State of Nevada,  
9 filed April 21, 2004.
- 10 EXHIBIT 90: Application for Order to Produce Prisoner, *The State of Nevada v. Terry*  
11 *Jess Dennis*, Case No. CR99-0611, In the Second Judicial District Court,  
12 State of Nevada, filed April 22, 2004.
- 13 EXHIBIT 91: Order to Produce Prisoner, *The State of Nevada v. Terry Jess Dennis*,  
14 Case No. CR99-0611, In the Second Judicial District Court, State of  
15 Nevada, filed April 23, 2004.
- 16 EXHIBIT 92: Ex Parte Motion for Order Allowing Interim Payment of Attorney's Fees  
17 and Costs to Appointed Counsel (Death Penalty Litigation), *Terry Jess*  
18 *Dennis v. State of Nevada*, Case No. CR99-0611, In the Second Judicial  
19 District Court, State of Nevada, filed April 23, 2004.
- 20 EXHIBIT 93: Order Approving Interim Fees and Costs of Court-Appointed Attorney  
21 (Death Penalty Litigation), *Terry Dennis v. State of Nevada*, Case No.  
22 CR99-0611, In the Second Judicial District Court, State of Nevada, filed  
23 April 27, 2004.
- 24 EXHIBIT 93: Order Approving Interim Fees and Costs of Court-Appointed Attorney  
25 (Death Penalty Litigation), *Terry Dennis v. State of Nevada*, Case No.  
26 CR99-0611, In the Second Judicial District Court, State of Nevada, filed  
27 April 27, 2004.
- 28 EXHIBIT 94: Order of Execution, *The State of Nevada v. Terry Jess Dennis*, Case No.  
CR99-0611, In the Second Judicial District Court, State of Nevada, filed  
May 17, 2004.

RESPECTFULLY SUBMITTED this 25<sup>th</sup> day of June 2004.

BRIAN SANDOVAL  
Attorney General

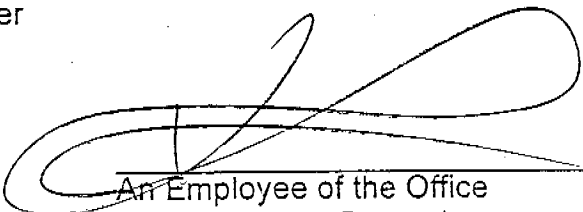
By:

  
ROBERT E. WIELAND  
Senior Deputy Attorney General  
Criminal Justice Division  
(775) 688-1818

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Office of the Attorney General of the State of Nevada and that on this 28th day of June 2004, I served a copy of the foregoing INDEX OF EXHIBITS IN SUPPORT OF MOTION TO DISMISS VOL. I OF II, by mailing a true copy, postage prepaid, to:

John Lambrose  
Assistant Federal Public Defender  
330 S. Third St., Ste. 700  
Las Vegas, NV 89101



An Employee of the Office  
of the Attorney General

Office of the Attorney General  
5420 Klatzke Lane, Suite 202  
Reno, NV 89511

1 IN THE UNITED STATES DISTRICT COURT  
2 FOR THE DISTRICT OF NEVADA  
3

4 Terry Jess Dennis, by and  
5 through Karla Butko, as  
6 Next Friend,

7 Petitioner,

8 -vs-

9 Michael Budge, Warden, and  
10 Brian Sandoval, Attorney  
11 General of the State of  
12 Nevada,

NO. CV-S-04-798-PMP  
United States District Court  
400 S. Virginia Street  
Reno, Nevada 89501

JULY 1, 2004

13 Respondents.

ORIGINAL

14 TRANSCRIPT OF PETITION FOR WRIT OF HABEAS CORPUS;  
15 PETITIONER'S ABILITY TO PROCEED AS MR. DENNIS' NEXT FRIEND;  
16 MOTION FOR APPOINTMENT OF COUNSEL; AND  
17 MOTION FOR STAY OF EXECUTION  
18 BEFORE THE HONORABLE PHILIP M. PRO  
19 UNITED STATES DISTRICT JUDGE

20 A P P E A R A N C E S:

21 FOR KARLA BUTKO:

22 Michael Pescetta  
23 Rebecca Blaskey  
24 Assist. Federal Public Defender  
25

1 A P P E A R A N C E S: (cont')

2

3 FOR THE RESPONDENTS: Robert Wieland  
4 David Neidert  
5 Deputy Attorneys General

6

7

8 Proceedings recorded by mechanical stenography produced by  
9 computer-aided transcript

10

11

12

13 OFFICIAL COURT REPORTER: KATHRYN M. FRENCH, RPR  
14 NEVADA LICENSE NO. 392  
15 CALIFORNIA LICENSE NO. 8536

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25

1 Reno, Nevada, Thursday, July 1, 2004, 1:30 p.m.

2 ---OoO---

3 THE COURT: Please be seated everybody.

4 Good afternoon. We're convened this afternoon in  
5 Civil S 04 hyphen 798, Dennis, by and through Karla Butko,  
6 as Next Friend versus Michael Budge and Brian Sandoval.

7 Counsel, I believe, have provided their  
8 appearances to the court clerk and court reporter. I  
9 understand we have Mr. Michael Pescetta and Ms. Rebecca  
10 Blaskey, both of the Federal Public Defender's Office.  
11 Miss Karla Butko is present. I hope I'm pronouncing that  
12 correctly.

13 MS. BUTKO: That's correct.

14 THE COURT: Mr. Robert Wieland.

15 MR. WIELAND: That's correct, Your Honor.

16 THE COURT: Great. And Mr. David Neidert.

17 MR. NEIDERT: That's correct, Your Honor.

18 THE COURT: All right. Excellent. And of course  
19 Mr. Terry Jess Dennis is also present seated at counsel table  
20 next to Ms. Butko.

21 Everyone, counsel and Mr. Dennis, let me just recap  
22 a bit what brings us here today. And then I want to proceed  
23 with some questions of Mr. Dennis, and then argument by  
24 counsel who are present, with regard to the matters which  
25 have been filed starting on the 14th of June.

1           On June 14th of this year, the Office of the Federal  
2 Public Defender for the District of Nevada filed the following  
3 motions, petitions applications:

4           At document one, a Writ For Petition of Habeas  
5 Corpus, pursuant to 28 U.S. Code Section 2254, supported by  
6 volumes of exhibits at documents 2, 3 and 4;

7           Document 5, A Memorandum with Respect to Standing  
8 of Next Friend, Karla Butko, who was formerly counsel to  
9 Mr. Dennis in prior state habeas for post-conviction  
10 proceedings;

11           Document 6, an Application to Proceed in Forma  
12 pauperis;

13           Document 7, a Motion for the Appointment of Counsel.

14           I'm bit number Flummoxed or puzzled by that  
15 particular motion. And I'll explain why, because of its  
16 structure, when we get to argument, because I think it's a  
17 bit amorphous to exactly who is being asked to be appointed as  
18 counsel for which entity. If we have a petition, it seems to  
19 me, a cognizable petition by a Next Friend. The petition  
20 would be the Next Friend, but I want you all to be prepared to  
21 address that.

22           And, a motion, at document 8, for Stay of Execution.

23           Upon receipt of those, I entered an order setting a  
24 hearing and directing respondents to file a response, which  
25 they did in a timely fashion on June 28th at documents 10, a

1 Response to the Motion for Appointment of Counsel; at document  
2 11, response to the Motion for Stay; and at document 12,  
3 Respondent's Motion to Dismiss.

4 Now, as I've indicated, that's a lot of paper  
5 filed by attorneys. But the one person who has not filed  
6 anything at all, directly, is Mr. Dennis.

7 And, Mr. Dennis, clearly, of everybody in the room,  
8 you're the person with the greatest stake, by far, as to what  
9 is currently brought before the Court. So, I would like to  
10 begin by addressing a series of questions to you. And I  
11 should say that, probably, you'll feel a bit of deja vu in  
12 the sense that I think a lot of these questions or similar  
13 questions that were perhaps put to you when you appeared on  
14 December 4th of last year before Judge Berry, that addressed  
15 your understanding of what is occurring, and your wishes as to  
16 what you desire to occur, and what you desire to take place  
17 with regard to those who are filing documents on your behalf,  
18 or purportedly on your behalf.

19 So, let me begin with that. And if I could ask  
20 you to please stand and raise your right hand and be sworn  
21 by the clerk so that I could then pose those questions to you.

22 (Clerk swears Terry Jess Dennis.)

23 THE COURT: Thank you. Please have a seat  
24 Mr. Dennis. Now, for the record, I just want to establish  
25 you are in fact Terry Jess Dennis, is that correct, sir?

1 MR. DENNIS: Yes, Your Honor. I am.

2 THE COURT: And Mr. Dennis, when did you first  
3 become aware that Mr. Pescetta of the Office of the Federal  
4 Public Defender, and/or Ms. Blaskey and Ms. Butko had caused  
5 the filing of the petitions and motions I just referred to  
6 on the 14th of June? Were you aware of them before they were  
7 filed?

8 MR. DENNIS: Your Honor, I have no way of knowing  
9 that. I get copies of motions being submitted and whatnot  
10 whenever I get them --

11 THE COURT: Okay.

12 MR. DENNIS: -- and, you know, I have no way of  
13 knowing --

14 THE COURT: I'm not trying to give you a test on  
15 the date. With regard to the filing of the motions that I  
16 outlined in the petition, did you have the opportunity to  
17 consult with either Mr. Pescetta, Ms. Blaskey or Ms. Butko,  
18 or all of them, with regard to the filing of the petition  
19 before it was filed?

20 MR. DENNIS: No, Your Honor. I actually had no  
21 desire to either.

22 THE COURT: Did you at some point communicate your  
23 desire not to file, or to have someone file such papers on  
24 your behalf?

25 MR. DENNIS: Not these papers per se, Your Honor,



1 but I have made it abundantly clear, I'm sure, to each of  
2 these people, that I'm not interested in their filing anything  
3 on my behalf.

4 THE COURT: Okay. Help me out in terms of -- I know  
5 or I'm familiar with the proceedings because I read the  
6 transcript of the proceedings on December 4th of last year  
7 before Judge Berry. But, since that time, have you had  
8 continued communication, let's take them one at a time,  
9 with Ms. Butko, for example, regarding efforts by her to  
10 take any action to delay your execution or to file papers,  
11 purportedly on your behalf, with respect to your case?

12 MR. DENNIS: Well, Your Honor, my memory isn't all  
13 that great, but I'm pretty darn sure that I have not.

14 THE COURT: All right. And was your last  
15 communication with Ms. Butko then an expression, among  
16 other things, of your desire not to pursue the matter  
17 further with regard to relief in the courts?

18 MR. DENNIS: That's correct, Your Honor. Yes.

19 THE COURT: And how about with regard to Ms. Blaskey  
20 or Mr. Pescetta. Have you ever met them prior to today?

21 MR. DENNIS: I had met Mr. Pescetta some time ago,  
22 and had several conversations with him, and I wrote him a  
23 letter making it, what I thought was abundantly clear, just  
24 leave it alone.

25 THE COURT: Approximately when did you write that

1 letter?

2 MR. DENNIS: Oh, I couldn't tell ya. It was --

3 THE COURT: Was it after the proceedings before  
4 Judge Berry?

5 MR. DENNIS: Six months ago?

6 THE COURT: Six months ago.

7 MR. DENNIS: Something like that.

8 THE COURT: Okay. All right. Did anyone  
9 specifically ask your permission to file the petition that  
10 I just outlined?

11 MR. DENNIS: No, Your Honor, they didn't.

12 THE COURT: The petition was filed and the motions  
13 and application were filed on June 14th, were you provided  
14 with copies of those papers -- I believe you said you were --  
15 did someone provide you with copies of them?

16 MR. DENNIS: Yes, Your Honor, I think I got copies.  
17 I get copies of everything that's, you know, filed and stuff.

18 THE COURT: Do you recall if you had a chance to  
19 read them in the last three weeks?

20 MR. DENNIS: I didn't care to read them, Your Honor.

21 THE COURT: All right.

22 MR. DENNIS: I eighty-sixed them.

23 THE COURT: All right. You elected not to read them  
24 or examine them.

25 MR. DENNIS: It was 25 pounds of paperwork.

1 THE COURT: Yes. I understand. It's a lot of  
2 paper. I received the same package, and so did the Attorney  
3 General, I know.

4 Well, I want to go in, if you will indulge me,  
5 Mr. Dennis, I think it's necessary to pursue with you a bit  
6 further by way of a canvass or series of questions to you,  
7 factors which I think are important to help me understand  
8 precisely what your desires are and your wishes are, and to  
9 make sure that I understand, or that I appreciate and can  
10 rule as to your capacity to make those determinations.

11 First of all, if you would just tell me for the  
12 record how old are you?

13 MR. DENNIS: Fifty-eight. I'll be 58 in two months.

14 THE COURT: In two months. And how far did you go  
15 in school, sir?

16 MR. DENNIS: Uh, one year of college.

17 THE COURT: Now, I am aware from the prior  
18 proceedings in State Court that I have read, that you  
19 have been subjected to examination by psychiatrists. But,  
20 tell me, are you at this time under the care of a physician  
21 or a psychiatrist for any reason?

22 MR. DENNIS: I'm taking medication, but it's --  
23 that's it, no --

24 THE COURT: Just the medications?

25 MR. DENNIS: Yeah, pharmacological therapy is what

1 I'm getting.

2 THE COURT: All right. And do you know the names of  
3 the medications you're taking?

4 MR. DENNIS: Yes, sir. I'm taking Lithium and  
5 Trazodone.

6 THE COURT: How often do you take those?

7 MR. DENNIS: Daily.

8 THE COURT: And do you know the dosages on those?

9 MR. DENNIS: Yes, sir. Hundred milligrams of -- or  
10 150 milligrams of Trazodone, and 900 mills of Lithium.

11 THE COURT: And you take those daily. Do you take  
12 those in the morning or in the evening?

13 MR. DENNIS: In the evening.

14 THE COURT: All right. Did you take them last  
15 night?

16 MR. DENNIS: Yes, sir.

17 THE COURT: All right. And other than those  
18 medications, those were prescribed by psychiatrists then?

19 MR. DENNIS: Yes. I'm sure.

20 THE COURT: Some medical person prescribed them for  
21 you?

22 MR. DENNIS: Yes.

23 THE COURT: Other than those medications, are you,  
24 today, under the influence of any other medication or narcotic  
25 drugs or alcoholic beverage?

1 MR. DENNIS: I wish.

2 THE COURT: All right. I take it, by that, you're  
3 not?

4 MR. DENNIS: No, sir.

5 THE COURT: Now, I want to go back to a little bit  
6 of the history of the case. And, again, this is not a test  
7 as to your recollection of a specific date, but just the  
8 events, and I would like to know whether you recall these  
9 events.

10 Directing your attention to April 16th of 1999, do  
11 you recall on that date, or do you recall the event at which  
12 you pled guilty to the murder of Elona Straumanis.

13 MR. DENNIS: Uh, no, I don't remember it, but I --  
14 that sounds about right.

15 THE COURT: Not as to the date, but do you remember  
16 the date when you actually pled guilty? Do you remember being  
17 in court pleading guilty?

18 MR. DENNIS: Not really. No.

19 THE COURT: Not really. All right.

20 Do you recall the sentencing proceedings that  
21 thereafter took place at which you were, in which the death  
22 penalty was imposed in your case?

23 MR. DENNIS: The proceedings in July, you're  
24 referring to?

25 THE COURT: Yes.

1 MR. DENNIS: Yes, I do.

2 THE COURT: You do recall those?

3 MR. DENNIS: Yes.

4 THE COURT: All right. Thereafter, the record  
5 indicates that in December of 2000, December 4th of 2000,  
6 your conviction and the sentence of death was upheld by the  
7 Nevada Supreme Court.

8 Now, I realize you weren't there, but do you  
9 recall ever receiving a decision of the Nevada Supreme Court  
10 upholding your conviction and sentence?

11 MR. DENNIS: I don't remember it, but I'm sure I  
12 did.

13 THE COURT: All right. There was a petition for a  
14 writ of habeas corpus filed thereafter, this was in April of  
15 2001, filed in state court. And if my understanding of the  
16 record is correct, Ms. Butko was appointed to represent you at  
17 or about that time.

18 Ms. Butko, am I accurate on that?

19 MS. BUTKO: That's correct.

20 THE COURT: All right. Do you recall at some  
21 point Ms. Butko being appointed by the court, Mr. Dennis, to  
22 represent you?

23 MR. DENNIS: Yes, Your Honor, I do.

24 THE COURT: All right. That petition for writ of  
25 habeas corpus was dismissed in June of 2003. And while

1 the matter was pending on appeal, you authored letters in  
2 September of last year, September 9th and September 17th,  
3 that were sent to the Washoe County District Court, and to  
4 the Washoe County District Attorney's Office, in which you  
5 expressed your desire to withdraw all further appeals.

6 Do you recall sending those letters or authoring  
7 those letters?

8 MR. DENNIS: Yes, sir, I do.

9 THE COURT: And were those letters authored by you?

10 MR. DENNIS: Definitely.

11 THE COURT: I mean, nobody wrote them for you?

12 MR. DENNIS: No. No.

13 THE COURT: And did anybody influence you or force  
14 you to write those letters at that time?

15 MR. DENNIS: No, Your Honor.

16 THE COURT: On December 4th of 2003, you appeared  
17 before Judge Janet Berry of the Washoe County District Court,  
18 for a hearing to determine your competency to make the  
19 decision that you expressed the desire to make in your  
20 letters, to withdraw your appeals and to proceed with the  
21 sentencing, execution of the sentence, the death penalty  
22 sentence.

23 Do you recall that hearing and being present in  
24 Judge Berry's court and her asking you a series of questions?

25 MR. DENNIS: Yes, I do, Your Honor.

1 THE COURT: Now, again, I don't want to go  
2 through that entire lengthy proceeding before Judge Berry,  
3 but there are some matters that I want to touch upon with  
4 regard to that as to the substance of those discussions.

5 One of the matters I recall that Judge Berry asked  
6 you about related to your medications at that time. And, as I  
7 understand it, you apparently had been transported from the  
8 prison to the Washoe County Jail the day before, so you had  
9 one day where you didn't have your medication.

10 Am I correct in that regard?

11 MR. DENNIS: That's correct.

12 THE COURT: All right. But you indicated on the  
13 record that missing the medications one day did not render  
14 you different in any way. You still were able to respond and  
15 understand the questions that were put to you?

16 MR. DENNIS: That's correct. The type of medication  
17 I take, you build up a tox level that doesn't -- you know, it  
18 takes, like, weeks for it to diminish. The one day doesn't  
19 matter.

20 MR. PESSETTA: Your Honor, pardon me for  
21 interrupting.

22 THE COURT: Yes.

23 MR. PESSETTA: But, Dr. Bittker, who is a witness  
24 whose testimony we want to present is now present. Since  
25 he's an expert witness, I think he can remain --



1 THE COURT: I have no objection.

2 MR. PESCETTA: -- during this colloque.

3 THE COURT: Sure. Dr. Bittker can be here. Sure.

4 MR. PESCETTA: I just wanted to put that on the  
5 record.

6 THE COURT: Sure. I have no problem with that.

7 MR. PESCETTA: Thank you.

8 THE COURT: All right. Judge Berry further asked  
9 you questions and reviewed with you the then existing petition  
10 for writ of habeas corpus, which set forth 33 claims, I  
11 believe it was.

12 Do you recall her discussing those with you?

13 MR. DENNIS: Yes, I do.

14 THE COURT: All right. And did you clearly  
15 understand during that discussion with Judge Berry that by  
16 expressing your desire to withdraw any appeals or any  
17 further proceedings with respect to those claims, that you  
18 were effectively waiving, or potentially waiving your right  
19 to litigate those claims.

20 Did you understand that?

21 MR. DENNIS: Yes, sir, I did.

22 THE COURT: Beyond the 33 claims that were  
23 expressly addressed with you by Judge Berry, do you  
24 understand that I can't possibly sit here and conjure up  
25 what other claims might exist, but I want to make sure you

1 fully understand that beyond those 33 claims, by making the  
2 waivers that you're attempting to make, and dropping all  
3 appeals, in addition to whatever was contained in those 33  
4 claims, you are effectively waiving or giving up any other  
5 legal challenges or claims that you might have with regard to  
6 your conviction or sentence.

7 Do you understand that?

8 MR. DENNIS: Yes, sir, I do.

9 THE COURT: Now, the proceedings that occurred  
10 before Judge Berry on December 4th, that we're only three days  
11 shy of that, being seven months ago, during that seven-month  
12 interval, has your wish or your desire changed in any way  
13 with regard to your desire to drop all appeals and to proceed  
14 with the sentence of execution?

15 MR. DENNIS: None whatsoever.

16 THE COURT: Now, do you understand that the  
17 warrant of execution that has now been issued provides  
18 that you are scheduled for execution, to be put to death on  
19 Thursday, July 22nd, 2004, at nine o'clock p.m.?

20 MR. DENNIS: (Nodding head up and down.) I'm aware  
21 of that, yes.

22 THE COURT: All right. So exactly three weeks from  
23 today, in essence.

24 Do you understand that?

25 MR. DENNIS: (Nodding head up and down.)

1 THE COURT: Do you understand that you will, in all  
2 probability, be put to death as scheduled on July 22nd, unless  
3 this court or some other court intervenes to stop or prevent  
4 the execution on that date?

5 MR. DENNIS: I realize that.

6 THE COURT: Do you understand that under the law,  
7 you're entitled to have both state courts and federal courts  
8 look at your case, examine your case, and decide whether or  
9 not you were legally and fairly convicted and sentenced to  
10 death.

11 Do you understand that?

12 MR. DENNIS: I do.

13 THE COURT: And do you understand that by waiving  
14 any further appeals or petitions, you are effectively waiving  
15 the right to have such a review in state court or federal  
16 court?

17 MR. DENNIS: I do realize that. Yes.

18 THE COURT: Do you understand that the manner in  
19 which the federal courts review convictions and death  
20 sentences that occur in the state courts, is through the  
21 vehicle called a petition for writ of habeas corpus.

22 Do you understand that?

23 MR. DENNIS: I don't know how the federal deal  
24 works, Your Honor, honestly.

25 THE COURT: All right. All right. That's

1 fair enough.

2 Do you understand that in connection with whatever  
3 the document would be, and it would be a writ of habeas  
4 corpus, that you would be entitled to have an attorney  
5 appointed, without cost to you, to represent you at all  
6 stages of the proceedings in federal court.

7 Do you understand that?

8 MR. DENNIS: Yes, I do.

9 THE COURT: One of the documents that was filed  
10 is a motion styled as a Motion to Stay Execution. Do you  
11 understand, Mr. Dennis, that a stay of execution is an order  
12 of the court that stops the execution, at least until the  
13 underlying habeas corpus petition is fully resolved in the  
14 federal courts.

15 Do you understand that?

16 MR. DENNIS: I do now.

17 THE COURT: All right. I'm telling you that,  
18 but is that something that you do understand. That, in  
19 essence, if a petition for writ of habeas corpus were filed  
20 and was cognizable or subject to consideration before the  
21 federal courts, that the federal courts would stay your  
22 execution until all issues were resolved in that matter?

23 MR. DENNIS: Yeah. I have a question, Your Honor.

24 THE COURT: Sure.

25 MR. DENNIS: I don't understand the concept of

1 someone filing motions without my consent to do something  
2 I'm against --

3 THE COURT: Yes.

4 MR. DENNIS: -- and having that even be considered.

5 THE COURT: Okay. Fair enough. That's a good  
6 point. And let me begin by explaining there's very little  
7 that can be done to prevent virtually anyone from filing  
8 anything, from actually filing it. When we're talking about a  
9 matter as serious as an execution, a sentence of death, the  
10 court is certainly going to conduct a hearing regarding that,  
11 as I am today. But, there are questions that need to be  
12 addressed with the attorneys who are present, touching upon  
13 whether in fact Ms. Butko can proceed as what's called a "Next  
14 Friend" for you and file such a petition. That's a very  
15 important core question. And it's not something that's  
16 easily understood by courts, let alone by individuals who are  
17 sitting in your position. That's something I'm going to  
18 have to resolve in connection with these proceedings today, or  
19 shortly after these proceedings today.

20 So, I understand your puzzlement in that regard, and  
21 maybe we should just kind of shift from my notes here right to  
22 that.

23 As you sit here today, Mr. Dennis, do you in  
24 fact object to the efforts by Ms. Butko or Mr. Pescetta or  
25 Ms. Blaskey, from their perspective on your behalf, but

1 object to their efforts to try to file papers which would  
2 stay your execution and present other legal arguments on your  
3 behalf?

4 Do you object to that?

5 MR. DENNIS: In the extreme.

6 THE COURT: All right.

7 MR. DENNIS: Yes.

8 THE COURT: All right. Do you understand that if  
9 you do tell me, as you've just said, that you do not want to  
10 pursue a petition for writ of habeas corpus in this court,  
11 you do not wish to stop the execution and you don't wish  
12 others to do it for you on your behalf, that this court then  
13 has to determine whether you are competent, mentally competent  
14 to make that decision.

15 Do you understand that?

16 MR. DENNIS: Yes, I do.

17 THE COURT: If you clearly and unambiguously tell  
18 me that you do not wish to proceed with a case in this court,  
19 and that you do not wish to stop your execution, and if I  
20 find that you are competent to make that decision, and that  
21 you are acting knowingly, intelligently, and voluntarily,  
22 then this court will not stop your execution, and you will  
23 very likely be put to death as scheduled on July 22nd at  
24 9:00 p.m.

25 Do you understand that?

1 MR. DENNIS: I do.

2 THE COURT: And are you stating to me now,  
3 unequivocally -- I think you used the word "extreme" a moment  
4 ago with regard to efforts by others -- are you telling me,  
5 unequivocally, that you do not wish this court to take any  
6 action to stop or prevent or delay your execution as scheduled  
7 on July 22nd?

8 MR. DENNIS: That is my desire.

9 THE COURT: All right.

10 MR. DENNIS: And I can't state that strongly enough.  
11 I mean --

12 THE COURT: Yes, I'm not asking you to repeat it  
13 over and over. It's clear to me that you are stating it very  
14 sincerely and very firmly. And I take from that that reflects  
15 your desire to in fact be put to death on July 22nd?

16 MR. DENNIS: Yes, sir.

17 THE COURT: Do you understand why you are being put  
18 to death by the State on July 22nd? What's your understanding  
19 as to why that's occurring?

20 MR. DENNIS: I think it kind of goes back to the  
21 old arcane "eye for an eye." I took a life, so I have to give  
22 one. That's my understanding.

23 THE COURT: All right. And you have no objection to  
24 proceeding in that fashion on July 22nd then?

25 MR. DENNIS: I welcome it.

1 THE COURT: Have you had any difficulty today in  
2 understanding the matters that I have discussed with you at  
3 this hearing?

4 MR. DENNIS: No, sir.

5 THE COURT: Is there anyone that has brought any  
6 pressure to bear on you to cause you to make the decision to  
7 drop appeals and not attempt to stay your execution?

8 MR. DENNIS: No, Your Honor. No one.

9 THE COURT: Are you acting of your own free will in  
10 making this decision?

11 MR. DENNIS: I am, Your Honor.

12 THE COURT: With regard to competence, do you  
13 believe that you are mentally competent? Do you have any  
14 reservations about your own competency to make this decision?

15 MR. DENNIS: Not at all, Your Honor.

16 THE COURT: From your perspective, do you believe  
17 that you are capable of making rational decisions about how to  
18 handle your case and the decision regarding your efforts to  
19 stop -- I'm sorry, to not stop your execution?

20 MR. DENNIS: I feel wholly competent in that  
21 respect, yes.

22 THE COURT: Now, today is three weeks before the  
23 date scheduled for your execution. I want to make sure  
24 that you understand that you do have the right to change  
25 your mind between now and the time of your execution. In



1 other words, you can stop your execution at anytime prior  
2 to its occurrence, by indicating your desire to proceed with  
3 a petition for writ of habeas corpus before this court.

4 Do you understand that?

5 MR. DENNIS: I do.

6 THE COURT: And all that would be required would  
7 be your communication through those who have custody of you,  
8 the warden to the court through counsel, be it Ms. Butko or  
9 Mr. Pescetta or Ms. Blaskey, indicating that that was your  
10 wish.

11 Do you understand that?

12 MR. DENNIS: Yes, sir, I do.

13 THE COURT: Now, you asked a question earlier  
14 indicating one thing you didn't understand. How could we  
15 be here and others filing paperwork trying to do something  
16 that you don't wish to have happen; that is, stopping the  
17 execution. Are there any other questions which you have that  
18 you wish to pose regarding this proceeding?

19 MR. DENNIS: I don't know enough to ask questions at  
20 this point.

21 THE COURT: Okay. All right. Let me turn a moment  
22 to just a couple of other areas. Bear with me just a second  
23 while I go through my notes and try to avoid repeating things  
24 that I have already said.

25 Do you understand that you have access to a

1 telephone at anytime to communicate your desires to proceed  
2 with an application to stay your execution if you wish to do  
3 so. Do you understand that?

4 MR. DENNIS: I -- I wasn't specifically aware of  
5 that, no, but I have a phone I can use anytime I want.

6 THE COURT: So you would be able to contact  
7 Mr. Pescetta, Ms. Butko --

8 MR. DENNIS: Right.

9 THE COURT: -- and express your desires to them.  
10 You understand that, do you not?

11 MR. DENNIS: I do now.

12 THE COURT: All right. Finally, before I turn it  
13 over to the attorneys to perhaps address any question areas  
14 that I've omitted, could you just tell me in your own words  
15 why you wish to drop any appeals or habeas proceedings, and  
16 why you wish to proceed with your execution as scheduled on  
17 July 22nd?

18 MR. DENNIS: Well, Your Honor, foremost, to me,  
19 death is preferable to another 15 or 20 years in prison.

20 THE COURT: All right. Any other -- anything else?

21 MR. DENNIS: That pretty much wraps it up.

22 THE COURT: Okay. All right.

23 Let me ask counsel, and while we still are in the  
24 throws of determining the extent to which a petition is  
25 cognizable, or counsel have standing to address matters, I

1 still think it would be appropriate to make the record very  
2 clear, Mr. Pescetta, do you or co-counsel, or Mr. Wieland,  
3 you or co-counsel, have any questions that you would put to  
4 Mr. Dennis on these subjects?

5 MR. WIELAND: Your Honor, I would object to any  
6 questioning proposed by Mr. Pescetta. He has not been  
7 established, neither he nor Ms. Butko have been established  
8 to have any standing whatsoever. And unless this court has  
9 any reason whatsoever to believe, based upon this individual's  
10 responses to the Court's questions, that he is somehow or  
11 another incompetent, it would be inappropriate at this point  
12 in time to allow questioning or anything else.

13 THE COURT: All right. It might be, but let me hear  
14 from both of you. You can pose them to me and I'll consider  
15 whether to ask them.

16 Mr. Pescetta, are there any questions that you think  
17 should be put to Mr. Dennis?

18 MR. PESSETTA: Yes, Your Honor. As you're  
19 aware from the exhibits that we have submitted along with  
20 the petition, Mr. Dennis has previously been diagnosed  
21 as suffering from bipolar-II disorder, or chronic major  
22 depression, and he's acknowledged that in previous testimony.  
23 If Your Honor could inquire whether Mr. Dennis acknowledges  
24 that he still suffers from that disorder.

25 We'd also like Your Honor to ask whether Mr. Dennis

1 believes that he currently suffers from lung cancer and,  
2 also, whether he has suffered from auditory or visual  
3 hallucinations, or has reported those to previous examiners.

4 THE COURT: All right.

5 Anything else?

6 MR. PESSETTA: I think that's all for us,  
7 Your Honor.

8 THE COURT: All right. Let me start with the lung  
9 cancer.

10 At this time, Mr. Dennis, are you aware, or have you  
11 been -- are you aware that you suffer from lung cancer or has  
12 somebody made you aware that you do?

13 MR. DENNIS: No, Your Honor.

14 THE COURT: Have you ever been diagnosed with lung  
15 cancer or treated for lung cancer?

16 MR. DENNIS: No, Your Honor.

17 THE COURT: With regard to auditory hallucinations,  
18 and I know Judge Berry, I think, addressed you on this subject  
19 at some point, do you currently suffer from hallucinations of  
20 any kind?

21 MR. DENNIS: No, Your Honor. I -- I have a past  
22 history of really chronic alcohol and drug abuse.

23 THE COURT: Yes.

24 MR. DENNIS: I couldn't describe to you some of the  
25 things I've seen and heard.

1 THE COURT: Since you've been in custody on, I guess  
2 it would have been March of 1999, have you continued to suffer  
3 from hallucinations?

4 MR. DENNIS: No.

5 THE COURT: All right. When you suffered from them,  
6 they were connected to your drug or alcohol use?

7 MR. DENNIS: I hope so.

8 THE COURT: Or at least they occurred at the same  
9 time?

10 MR. DENNIS: Yes, sir.

11 THE COURT: All right. And with regard to the  
12 reference to bipolar disorder and suicidal ideations  
13 or tendencies or desires and attempts, this was also a  
14 subject of discussion before Judge Berry on December 4th,  
15 but currently what is your awareness of your condition with  
16 regard to those conditions?

17 MR. DENNIS: Today?

18 THE COURT: Yes.

19 MR. DENNIS: I'm being medicated for the bipolar  
20 issue, and I haven't had any problems with that. I mean,  
21 other -- I think everyone who is locked up can tell you a  
22 little bit about depression, you know, whether they're loony  
23 or not. So, as far as I'm concerned, I'm just fine.

24 THE COURT: And what about suicidal tendencies or  
25 ideations?

1 MR. DENNIS: There, again, most of that stem from  
2 chronic heavy alcohol and drug use. And after I'd blown all  
3 my money on dope or whatever, I would get really down, you  
4 know, and I would think about killing myself.

5 THE COURT: Have you attempted suicide since the  
6 proceeding before Judge Berry on December 4th of 2003?

7 MR. DENNIS: No, Your Honor, I -- the last time was  
8 so long ago I can't even remember it.

9 THE COURT: Prior to your arrest in March of 1999?

10 MR. DENNIS: Yes, sir.

11 THE COURT: All right.

12 And Mr. Wieland, did you have any questions, or  
13 co-counsel?

14 MR. WIELAND: I have no questions, Your Honor.

15 THE COURT: All right.

16 MR. PESSETTA: Your Honor, if I could ask Your Honor  
17 to ask one more follow-up.

18 THE COURT: Sure.

19 MR. PESSETTA: Whether Mr. Dennis has ever reported  
20 to anyone that he believes he suffers from lung cancer.

21 THE COURT: All right.

22 MR. WIELAND: Your Honor, I fail to see the  
23 relevance of that with respect to this hearing?

24 THE COURT: Yes, I do, too. I don't --

25 MR. PESSETTA: Well, Your Honor, this is a question

1 that I discussed with Dr. Bittker and, apparently --

2 THE COURT: Do you have medical evidence that he  
3 suffers from lung cancer?

4 MR. PESSETTA: No, Your Honor. It's a question of  
5 whether he has reported that to anyone.

6 THE COURT: Who specifically are you thinking of?

7 MR. PESSETTA: To Ms. Butko.

8 THE COURT: All right.

9 Do you recall ever telling Ms. Butko that you had  
10 lung cancer or thought you had lung cancer?

11 MR. DENNIS: I think what the thing was, I -- I --  
12 they were trying to figure out why I wanted to waive my  
13 appeal, and I was saying that my age, plus the fact that  
14 I've been smoking for over 45 years, I have -- I've been  
15 getting a lot of chest pains and stuff. You know, I wouldn't  
16 be surprised if I had lung cancer, you know. And that's  
17 about --

18 THE COURT: That's the manner in which it was  
19 expressed?

20 MR. DENNIS: Pretty much, yeah.

21 THE COURT: But you've not sought medical treatment  
22 for lung cancer or any examinations, respiratory examination?

23 MR. DENNIS: No, sir. They'd probably tell me to  
24 quit smoking and that ain't going to happen.

25 THE COURT: I think you're probably right that they

1 probably would tell you that. And you're probably right on  
2 what would happen as well.

3 All right. Thank you, Mr. Dennis. I appreciate  
4 your responses to my questions. I want to turn next to the  
5 attorneys who are present to address the matters that have  
6 been filed.

7 I expressed some confusion, Mr. Pescetta, over the  
8 Motion for Appointment of Counsel. My recollection of the  
9 response was that no definitive response was needed because  
10 it should be mooted by the fact that there's no basis to  
11 proceed. But, I'm in a bit of a quandary when I look at the  
12 papers that have been filed. They're styled at the top  
13 under the heading of the Federal Defender's Office, "Attorneys  
14 for Petitioner, slash, Next Friend." And at document 7, the  
15 Motion for Appointment of Counsel, under 21 U.S. Code Section  
16 848, it states: "Petitioner, Terry Dennis, an indigent,  
17 through Next Friend, Karla Butko, moves this court for its  
18 order appointing counsel for purposes of this federal habeas  
19 corpus proceeding."

20 Perhaps I read that incorrectly, but I read that  
21 as your application that the Federal Defender's Office be  
22 appointed to represent, is it Mr. Dennis, or is it the Next  
23 Friend, Ms. Butko, who is the petitioner in this case. And  
24 if it's Ms. Butko, I don't know, but I'm assuming she is not  
25 indigent, and I know she's also an attorney.



1 MR. PESCETTA: Let me try to clarify that,  
2 Your Honor. My understanding is that under Whitmore versus  
3 Arkansas, even if Next Friend standing is established, the  
4 real party in interest, the actual petitioner, would remain  
5 Mr. Dennis.

6 So, if Your Honor found that there is standing for  
7 the Next Friend to proceed on Mr. Dennis' behalf, Mr. Dennis  
8 remains the petitioner, remains the real party in interest.  
9 The Next Friend does not have any independent standing or  
10 status in the litigation, except as the Next Friend of the  
11 petitioner.

12 So, if Your Honor were to find standing on  
13 Ms. Butko's behalf to proceed on Mr. Dennis' behalf, then  
14 Mr. Dennis would be entitled to appointment of counsel,  
15 and that's what we're requesting.

16 Of course if Your Honor finds that there is no  
17 standing, then that --

18 THE COURT: Well, Mr. Wieland points that out. If  
19 there's no standing, hence there's no need to even address the  
20 appointment of counsel.

21 MR. PESCETTA: Yes. Yes, Your Honor. And that's  
22 really, simply, a function of the structure.

23 THE COURT: Yes. I don't want to put the cart  
24 before the horse, but I just wanted to --

25 MR. PESCETTA: No, it's really a question of the

1 structure of the litigation, as I understand it, under  
2 Whitmore versus Arkansas. No matter whether the "Next Friend"  
3 is allowed in or out of the litigation, the petitioner remains  
4 the real party in interest. And that would be Mr. Dennis.

5 THE COURT: All right.

6 MR. PESCETTA: So if Your Honor finds that Ms. Butko  
7 can proceed and have us act on Mr. Dennis' behalf, it would  
8 still be us acting on Mr. Dennis' behalf.

9 THE COURT: All right.

10 MR. PESCETTA: And since we are already on this  
11 topic, you know, perhaps I can narrow the issues somewhat  
12 that I think are before the Court.

13 We do not make a claim that Mr. Dennis is  
14 cognitively unable to understand what is going on in terms  
15 of the standard of Rees versus Peyton or Whitmore Arkansas.  
16 We are claiming only that because of his mental illness, he  
17 is unable to make a rational choice with respect to continuing  
18 or ending further litigation of his capital case.

19 THE COURT: So your problem is with the volitional  
20 aspect not the cognitive?

21 MR. PESCETTA: We would concede at this point, that  
22 Mr. Dennis, whatever his memory of the previous occurrences in  
23 the case, and the proceedings of court are, understands what's  
24 going on cognitively. The question is, volitionally, does  
25 he have a sufficient rational ability to make that choice, as

1 opposed to one that is in the language of Rees versus Peyton.

2 THE COURT: And what is your basis for arguing  
3 that he does not have the volitional capacity, that he's  
4 suffering, in essence, from a mental disease or defect that  
5 prevents him from understanding -- I'm sorry, not from  
6 understanding, but from exercising his volitional decision?

7 MR. PESSETTA: I mix it up myself all the time,  
8 Your Honor.

9 The fact is that exhibit 50, which is Dr. Bittker's  
10 report --

11 THE COURT: Right.

12 MR. PESSETTA: -- at page 8 says, and I quote: "I  
13 believe, with a reasonable degree of medical certainty, that  
14 the defendant's desire to both seek the death penalty and  
15 to refuse appeals in his behalf, are directly a consequence of  
16 the suicidal thinking and his chronic depressed state, as well  
17 as his self-hatred."

18 And then lower down, on pages 8 to 9: "It is in my  
19 mind likely that both the defendant's offense and his current  
20 court strategy springs from his psychiatric disorder and his  
21 substance abuse disorder."

22 That's the basis of our claim that under the  
23 Rees versus Peyton standard, however clear it may be that  
24 Mr. Dennis is capable of understanding what is going on, the  
25 question of having a rational ability to make that choice

1 is not present. And therefore, under the standard of  
2 Rees versus Peyton, he is not competent to waive further  
3 proceedings.

4 THE COURT: Now, Judge Berry, in her order in  
5 December of 2003, effectively found otherwise, didn't she?

6 MR. PESSETTA: She found otherwise on grounds that  
7 did not take into account the Rees versus Peyton standard,  
8 which is nowhere quoted or cited in her order.

9 THE COURT: Well, the case itself, what was it  
10 Rumbaugh? There was reference to the Rumbaugh case. Maybe  
11 that was in the Supreme Court's --

12 MR. PESSETTA: There are references in the Rumbaugh  
13 case in the Supreme Court opinion and Rees versus Peyton  
14 is cited in the footnote of the Supreme Court opinion. But,  
15 this is nowhere an application of that standard of the Rees  
16 versus Peyton standard, that is to say, whether his ability to  
17 make a rational choice is substantially affected by his mental  
18 illness.

19 THE COURT: I realize there may not have been a  
20 reference to the case itself, but let me get to her order, to  
21 Judge Berry's order. Bear with me for a second while I look.

22 I'm referring to the order of December 22nd, 2003.  
23 It's exhibit 52 to the petition. At paragraph 10, line 18:

24 "Based on Dr. Bittker's report and all other  
25 evidence before the court, the court finds Dennis does not

1 suffer from any disease or mental defect that prevents him  
2 from making a rational choice among his various legal options,  
3 including whether to pursue any further litigation that may  
4 save his life."

5           It goes on: "The court finds Dennis is capable of  
6 assisting his own defense. And understanding the nature of  
7 legal proceedings, he may pursue to avoid or delay imposition  
8 of the death penalty."

9           Now, while there's no reference to Rees or to  
10 Rumbaugh, isn't that an express finding that would meet that  
11 standard?

12           MR. PESSETTA: I think not, Your Honor, because --

13           THE COURT: Where does it fail?

14           MR. PESSETTA: -- it is not based -- in my view, it  
15 is not based on the record. Because as Judge Berry was  
16 saying, based on Dr. Bittker's report --

17           THE COURT: And the other evidence; her canvass,  
18 other things that were --

19           MR. PESSETTA: -- that raises a slightly different  
20 question, Your Honor. But based on Dr. Bittker's report,  
21 which expressly says that this desire to be executed is,  
22 quote, directly a consequence, unquote, of his chronic  
23 depression, that is a state court factual finding that is  
24 unsupported by the evidence before the court.

25           Now, there are some other difficulties with

1 that proceeding, and we've outlined those in our memorandum  
2 with respect to standing. First, there was no adversarial  
3 litigation in the course of that proceeding. The counsel  
4 for Mr. Dennis expressly disclaimed any position that he  
5 would take, adverse to Mr. Dennis' wishes to go ahead and  
6 be executed.

7           So, that's a very fundamental flaw in that  
8 proceeding which, in our view, renders those findings, if  
9 in fact they can be construed as findings that would satisfy  
10 Rees, unsupported.

11           And I would direct the Court's attention to the  
12 most recent Ninth Circuit authority on the presumption of  
13 correctness and on the unreasonable application standard under  
14 2254(d), which is Judge Kozinski's opinion in Taylor versus  
15 Maddox, which expressly says that there is not a presumption  
16 if the state court process is defective.

17           Now, Dr. Bittker was not called to testify in the  
18 hearing in front of Judge Berry to defend his report, or to  
19 be examined on whether, in fact, under the appropriate legal  
20 standard, what his conclusion, to a reasonable degree of  
21 medical certainty, was in fact sustainable. What we have  
22 is --

23           THE COURT: His report says what it says. I mean,  
24 it contains the language, "to a reasonable degree of medical  
25 certainty", and states his conclusions. But, you're right,

1 he was not examined as to that. The parties stipulated  
2 otherwise.

3 MR. PESSETTA: Well, and that's, unfortunately, the  
4 kind of circularity we run into in these cases. At the point  
5 where we give up the adversarial litigation in the state court  
6 system, on the assumption that the individual is competent  
7 to waive his right to further review, and so there is no  
8 fleshing out of the facts, then the record that is created  
9 is necessarily misleading. That's why we want to present  
10 Dr. Bittker's testimony here to emphasize that, yes, the  
11 objections that were raised by Mr. Dennis to the accuracies of  
12 his report are in fact not well-taken.

13 And, to the extent that Judge Berry was relying  
14 simply on Mr. Dennis' responses, on his demeanor and the  
15 apparent lucidity of his responses, that, from the point of  
16 view of a trained psychiatrist, that is entirely misleading  
17 with respect to the question whether an individual is in  
18 fact acting in a way that is substantially affected by,  
19 in this case, chronic depression and the bipolar-II disorder.  
20 And that's where, it's our position then, that the defects  
21 in the state proceeding prevent the Court from affording  
22 any presumption of correctness to that proceeding. But  
23 intrinsically, even on the basis of the record of that  
24 proceeding, it simply is not possible, I submit, for  
25 Judge Berry to have said, based on a report that says

1 that this decision is a product of this individual's  
2 mental illness, that this decision is not a product of  
3 this individual's mental illness. I think that's about as  
4 simple as it gets.

5 If you look at the other cases that have been cited  
6 by the state, and there is always equivocation, there is  
7 always, perhaps, a diagnosis, or a potential diagnosis, or a  
8 possible diagnosis, here, we have the most recent examination  
9 of this individual that was conducted in November of last  
10 year, in which the doctor says this decision is directly a  
11 consequence of the mental illness that Mr. Dennis has  
12 essentially conceded the existence of in previous hearings.  
13 And that, it seems to me, Your Honor --

14 THE COURT: Well, saying it's a consequence is one  
15 thing, but does the doctor say that Mr. Dennis is suffering  
16 from a mental disease or defect which prevents him from making  
17 a rational choice among the available options?

18 MR. PESSETTA: Your Honor, I don't see how we can  
19 read those sentences that I just recited without coming to  
20 that conclusion.

21 THE COURT: Well, that's your conclusion. I  
22 understand. Judge Berry read the same report and came up  
23 with a different conclusion, which she expressed in her  
24 written decision.

25 You propose to call Dr. Bittker. Give me a proffer



1 as to what you understand his testimony would be in this  
2 respect.

3 MR. PESCETTA: Well, Dr. Bittker will make it clear,  
4 although I think the report is reasonably clear, that he does  
5 diagnose Mr. Dennis as having bipolar disorder, this bipolar  
6 disorder II --?

7 THE COURT: Right.

8 MR. PESCETTA: -- which is, essentially, chronic  
9 depression. That's the diagnosis that he outlines in the  
10 report.

11 THE COURT: Right.

12 MR. PESCETTA: And then he makes the conclusion  
13 that the decision to cease further appeals is directly a  
14 consequence of -- and let me just get the --

15 THE COURT: Is he going to say that that mental  
16 disease or condition prevents Mr. Dennis from making a  
17 rational choice among the options open to him?

18 MR. PESCETTA: I think he is certainly going to say  
19 under the Rees standard, that it substantially affects his  
20 ability to make that rational decision. And I think he will  
21 say it prevents a rational decision under the circumstances.

22 THE COURT: Rees is, you know, a 1966 case, and  
23 there's been a lot written since then. And I know I'm  
24 harping on Rumbaugh, but other cases in the circuit have too,  
25 even though it's from the Fifth Circuit --

1 MR. PESCETTA: The last decision from the United  
2 States Supreme Court in Whitmore versus Arkansas says that  
3 Rees is the standard that we are incorporating into the  
4 "Next Friend" analysis, the standard that we applied in Rees  
5 versus Peyton.

6 I think that the proffer that we would make is, yes,  
7 the doctor is going to say this mental disease, defect or  
8 disorder, this chronic depression, does substantially affect  
9 his ability to make a rational choice, and does prevent him  
10 from making a fully rational choice whether or not to decide  
11 to die or not.

12 He would also testify, based on his experience,  
13 which includes a considerable amount of experience treating  
14 people with depression, which is not something that was  
15 testified to in front of Judge Berry, but this is part of  
16 his expertise, that people who suffer from depression do  
17 not necessarily display it in a flamboyant way. That it is  
18 not, it is not normally possible for lay people -- and I  
19 am certainly a layperson. And I mean no disrespect to  
20 Your Honor to say that I think Your Honor is, too -- to say  
21 that because Mr. Dennis appears lucid and appears quite  
22 determined to proceed in the way he proposes, that that  
23 does not mean that his ability to make a rational choice to  
24 do that is not affected by his chronic depression. And I  
25 think that in --

1 THE COURT: Well, being "affected by" is different  
2 than "effected by," or being determined by or dictated by,  
3 it seems to me. I'm sure a lot of things can affect what  
4 decisions are made by --

5 MR. PESSETTA: Well, I go back to the "substantially  
6 affected" language in Rees. But, again, I go back to  
7 the defect in the state court proceeding. Dr. Bittker was  
8 not called to explain that. Dr. Bittker was not called to  
9 explain that although Judge Berry may have been impressed,  
10 as I think everyone always is by Mr. Dennis' apparent  
11 lucidity and his determination, that that does not mean he  
12 is not suffering from chronic depression, and that that is  
13 the reason that he is choosing to be executed and, therefore,  
14 we are within the standard of Rees.

15 THE COURT: Well, Dr. Bittker's report addresses  
16 questions that have been posed by the Court in its, basically  
17 its request connecting the, or with connection to the  
18 examination, and stated as follows: "The defendant does  
19 have sufficient present ability to consult with his attorney  
20 with a reasonable degree of factual understanding;

21 "Second, the defendant has a rational and factual  
22 understanding of the proceedings. He is fully aware of the  
23 charges that he confronts, the implications of the sentence,  
24 and has a full understanding of what is involved in the death  
25 penalty. He is also aware of the legal options available to

1 him, and the consequences of his not proceeding with these  
2 options;

3 "Third, the defendant is currently taking  
4 medications that are reasonably consistent with the diagnosis  
5 of bipolar disorder. And his primary psychiatric problems,  
6 alcohol, amphetamine and cocaine dependence, are contained by  
7 virtue of the total institutional control in his life; and

8 "Fourth, the medications that he is taking are  
9 not having an unusual effect on the defendant's ability to  
10 make decisions on behalf of his own interest, and to cooperate  
11 with counsel or to participate in the court hearing."

12 So, you're not taking issue with any of those  
13 findings made by the doctor?

14 MR. PESSETTA: No, Your Honor. I submit that all  
15 goes to the cognitive issue. And, again, we don't think that  
16 in terms of the cognitive issue that there is a problem.

17 What we have here is an individual who suffers  
18 from bipolar disorder and this chronic depression. And it's  
19 Dr. Bittker's opinion that that is what is motivating this  
20 decision to be executed. And, in fact, Dr. Bittker says  
21 that he believes that that is the reason why he committed  
22 the homicide in the first place, was in order to get himself  
23 executed.

24 Now, that's not a question of cognitive  
25 difficulties. It's not a question of whether he is

1 able to understand and cooperate with counsel rationally, to  
2 the extent that we are talking about knowing what's going  
3 on, talking to counsel on other issues rationally. It's a  
4 question, as Your Honor said, of volition. It's a question  
5 of when he makes that choice "I want to die," is that a  
6 function of his depresssive disorder, which is a mental  
7 defect or disorder, or is it a product of, for lack of a  
8 better word, free will.

9           It's our position that had Dr. Bittker been able to  
10 testify in front of Judge Berry and explain that the fact that  
11 Mr. Dennis appears lucid, the fact that he appears determined,  
12 really has no bearing on whether or not he is suffering from a  
13 mental disease or disorder that in fact could be motivating  
14 his choice here. That's one of the defects in the state court  
15 proceeding that renders those findings, I submit, irrelevant  
16 to the Court's determination and is why Your Honor should hear  
17 Dr. Bittker's testimony.

18           THE COURT: All right. Anything else that you care  
19 to add before I hear from Mr. Wieland?

20           MR. PESCETTA: Not at this time, Your Honor.

21           THE COURT: All right.

22           Mr. Wieland.

23           MR. WIELAND: Your Honor, Mr. Pescetta's remarks are  
24 wholly and entirely without merit and, in our estimation, in  
25 accord with the bad faith proceedings that are presently

1 before this court.

2           The factual findings are there. He says he doesn't  
3 dispute it and then he turns around and says somehow or  
4 another this affects Mr. Dennis' volitional aspect of this  
5 thing. I guess by Mr. Pescetta's account, nobody who has  
6 any kind of mental problem whatsoever can make any kind of  
7 volitional choice. But, the problem is whether it's a  
8 rational choice. That's what the test is.

9           Mr. Dennis has made it abundantly clear to this  
10 court that he does not want to proceed with this action.

11           Now, I would suggest to the Court that unless this  
12 court, based on the questions posed by Mr. Dennis and the  
13 responses that this court has, if there are any doubts about  
14 competency, there certainly isn't any reason to go any  
15 further with this, this hearing, I mean such as it is. I  
16 mean this is -- we've heard -- we already demonstrated through  
17 our pleadings that they withheld, presenting to this court  
18 Ms. Butko's motion to withdraw. We hear now, we find out  
19 now that Mr. Pescetta didn't present a letter from Mr. Dennis  
20 to him saying don't do anything on my behalf.

21           How much more plain does Mr. Dennis have to be?  
22 The fact that Mr. Pescetta does not agree with Mr. Dennis'  
23 decision, the fact that if it be such that Ms. Butko doesn't  
24 agree --

25           THE COURT: No, Mr. Dennis is perfectly clear in his

1 position. There's no ambiguity. It's a lucid --

2 MR. PESSETTA: And just if I may, Your Honor, we  
3 don't contest that.

4 THE COURT: I know. I understand.

5 MR. PESSETTA: We have no -- we are not making that  
6 claim.

7 THE COURT: Just address -- yes.

8 Mr. Wieland, just address for me whether there is a  
9 basis to hear, at this proceeding, testimony from Dr. Bittker  
10 with respect to the report that he made that was not given  
11 before the state court.

12 MR. WIELAND: I don't see that there's any utility  
13 at all. He's given his report. He's made his findings.  
14 There isn't any indication he's going to say anything  
15 different whatsoever. And furthermore, as I indicated,  
16 Your Honor, you can't even get to that point unless there's  
17 some doubt about Mr. Dennis' competency based upon his  
18 responses to you in this matter.

19 If this court is satisfied in and of itself,  
20 under the appropriate standard, after asking Mr. Dennis the  
21 question, that's the end of the hunt. They don't get to horn  
22 in and just because they filed something, get to have an  
23 evidentiary hearing. The case law doesn't allow that.

24 THE COURT: There's no question that considerable  
25 deference must be given to the factual findings of the state

1 court in these proceedings.

2 MR. WIELAND: Absolutely.

3 THE COURT: And, that the burden of clear and  
4 convincing evidence is a heavy one on --

5 MR. WIELAND: Well, Mr. Pescetta hasn't even -- he's  
6 arguing some sort of a distinction that has no difference  
7 whatsoever based on what I understand and what he's presented.

8 THE COURT: I'm not sure.

9 Mr. Pescetta, are you saying if Dr. Bittker takes  
10 the stand, he's going to simply say what he said in his  
11 report, which you argue evidences the lack of volition on the  
12 part of the petitioner, and it was simply Judge Berry's error  
13 in misapprehending that?

14 MR. PESCETTA: That's the intrinsic, that's what, in  
15 Taylor versus Maddox, Judge Kozinski called the intrinsic  
16 attack on the state judgment. What we have -- on the state  
17 findings.

18 What we have here, if I can just segregate those two  
19 things, are state court findings that are purportedly based in  
20 part on Dr. Bittker's report --

21 THE COURT: Right.

22 MR. PESCETTA: -- that are 100 percent contrary to  
23 what Dr. Bittker actually said on the relevant issue, which is  
24 that the decision is a consequence of the --

25 THE COURT: If that's so, why do you need



1 Dr. Bittker's testimony to repeat that then?

2 MR. PESCETTA: Well, the other half of it, the  
3 extrinsic part, which I think that we can get to under  
4 Taylor versus Maddox, is that the emphasis that is made  
5 both by counsel and by Judge Berry and by the Nevada Supreme  
6 Court, about a lay judge's ability to detect whether somebody  
7 is being influenced by mental illness in making this decision,  
8 simply is not true. And that from the point of view of a  
9 mental health expert, when we rely on the apparent lucidity  
10 of an individual who suffers, who has previously conceded  
11 suffering from a bipolar disorder that results in chronic  
12 depression, that we cannot really, as lay people, just look  
13 at him and look at his demeanor and say, well, he looks fine  
14 to us essentially.

15 THE COURT: All right.

16 MR. PESCETTA: That's the --

17 THE COURT: Here's what I'm going to do, counsel.  
18 I mean, I'm not at all sure I agree with you one bit,  
19 Mr. Pescetta, on your argument, but we're confronted with  
20 the situation where an execution is set three weeks away. No  
21 matter what I rule today, there is going to be a review of  
22 that ruling -- or whatever I rule tomorrow or whenever I rule,  
23 but it will certainly be shortly -- and if ever there's going  
24 to be something in the record, whether it's to be considered  
25 or not considered, this is probably the time and the place to

1 document that or to preserve that.

2           So, I will allow you, and I'm not making a finding  
3 at this point or drawing any conclusions as to the weight  
4 which should be afforded to, but to make sure, having heard  
5 your proffer, that we have a complete record, I will let you  
6 put Dr. Bittker on the stand to address those limited points  
7 that you have raised and, of course, let Mr. Wieland  
8 cross-examine those as he chooses. Then I'll hear any final  
9 argument you all have, and the matter will be submitted unless  
10 you have something else that you wish to address.

11           MR. PESSETTA: Your Honor --

12           THE COURT: Bear with me one second. Bear with me.  
13 I apologize. Just for one second.

14           Counsel, indulge me just for a moment. The clerk  
15 gave me a note. I have to attend to one matter just very  
16 briefly. Give me five minutes, and then we'll reconvene.  
17 All right.

18           (RECESS TAKEN.)

19           (Back on record 2:50 p.m.)

20           THE COURT: Please have a seat everyone.

21           MR. WIELAND: Your Honor, if I may, there's a matter  
22 I would like to bring to the Court's attention.

23           THE COURT: Yes, Mr. Wieland.

24           MR. WIELAND: It occurred outside the presence of  
25 the court.

1           Your Honor, while I was standing here, Mr. Dennis  
2 was apparently inquiring of Ms. Blaskey whether or not he  
3 could talk to me and, I guess, Ms. Blaskey had some sort of  
4 response. Mr. Dennis indicated that he wanted to talk to me,  
5 so I went over there and Ms. Blaskey said, you know,  
6 he's represented by counsel. I said it's not you. He's not  
7 represented by counsel.

8           THE COURT: Right.

9           MR. WIELAND: Mr. Dennis pointed some stuff out to  
10 me, he said, that, you know, he wished me to represent to the  
11 Court. And I suggested to Mr. Dennis that he address the  
12 Court with respect to the particular points.

13          THE COURT: All right.

14          MR. WIELAND: Now, I think -- the reason I'm  
15 bringing this to the Court's --

16          THE COURT: I'll hear anything Mr. Dennis has to  
17 say, obviously.

18          MR. WIELAND: Well, Your Honor, the reason I'm  
19 bringing this to the attention of the Court is Ms. Blaskey  
20 apparently had some difficulty with me talking to Mr. Dennis.

21               Now, Mr. Dennis is not represented by Ms. Blaskey,  
22 Mr. Pescetta, Ms. Butko or anybody else.

23          THE COURT: Well, okay. I really don't care about  
24 you and Ms. Blaskey. You all can take it outside and talk  
25 about it later. What I care about right now is Mr. Dennis and

1 what we're going to have in terms of testimony. There's no  
2 reason Mr. Dennis can't, if he's got something he wants to  
3 address with me, he can address it right now in court on the  
4 record or, for that matter, he can talk to you. He can phone  
5 you, write you letters. You're right he doesn't have counsel  
6 at this point.

7 But, Mr. Dennis, go ahead. What were the points or  
8 the matters that you wanted to raise at this point?

9 MR. DENNIS: Well, Your Honor, with respect to  
10 Dr. Bittker's report, it seems that certainly if someone  
11 were not receiving medication or therapy for depression  
12 or whatever, then a suicidal ideology would seem, to me,  
13 reasonable.

14 THE COURT: Right.

15 MR. DENNIS: However, I do not suffer from  
16 depression. I'm being treated for whatever somebody else  
17 decided I had, and that diagnosis has been changed a  
18 half-a-dozen times, believe me. I just wanted that to  
19 be known.

20 THE COURT: All right. All right. Fair enough.  
21 And before we end these proceedings today, after we hear  
22 from the doctor and anything else, I'll give you another  
23 opportunity in case there's something you want to add with  
24 respect to anything that has occurred. So, you're free to,  
25 certainly free to do that. All right.

1 MR. DENNIS: Fair enough.

2 THE COURT: Let's have the doctor come on up then.

3 Sir, if you would please step up to the stand and be  
4 sworn by the clerk, Dr. Bittker.

5 MR. WIELAND: Your Honor, before the doctor  
6 testifies --

7 THE COURT: Yes.

8 MR. WIELAND: -- I would offer my objection to his  
9 testimony at this time.

10 THE COURT: Right.

11 MR. WIELAND: In fact, if I may, I would like to  
12 make a couple of points.

13 THE COURT: Go ahead.

14 MR. WIELAND: I would like to direct this Court's  
15 attention to Godinas versus Moran at, I'm sorry, I don't have  
16 the -- excuse me. Appearing at 113 Supreme Court 2680.

17 I would like to direct the Court's attention to  
18 the U.S. cite, page 398, paragraph there stating that -- well,  
19 basically, Your Honor, Moran holds that:

20 "The competency standard for pleading guilty or  
21 waiving the right to counsel is the same as the competency  
22 standard for trial where the defendant has sufficient present  
23 ability to consult with his lawyer with a reasonable degree of  
24 rational understanding, and a rational as well as factual  
25 understanding of the proceedings against him." Relying on

1 Dusty versus United States 362 U.S. 402, a procuring decision.

2           The Moran court goes on to state at three-, at the  
3 U.S. cite 397 to 398: "The standard adopted by the Ninth  
4 Circuit is whether a defendant who seeks to plead guilty or  
5 waive counsel has the capacity for a reasoned choice among the  
6 alternatives available to him. How this standard is different  
7 from, parentheses, much less higher than, close parentheses,  
8 the Dusty standard, whether the defendant has a, quotes,  
9 rational understanding, close quotes, of the proceedings is  
10 not readily apparent to us. In fact, respondent himself,  
11 post-certiorari, on the ground that the difference between the  
12 two standards is merely one of terminology, and he devotes  
13 little space in his brief on the merits to the defense of the  
14 Ninth Circuit standard. Due process does not require a higher  
15 standard, it requires a separate inquiry."

16           The court at footnote 9 states: "That even assuming  
17 that there is some meaningful distinction between the capacity  
18 for reasoned choice and a rational understanding of the  
19 proceedings, we reject the notion that competence to plead  
20 guilty, to waive the right to counsel, must be measured by a  
21 standard that's higher than, or even different from the Dusty  
22 standard."

23           At footnote 9 they say: "We have used the phrase  
24 'rational choice' in describing the competence necessary to  
25 withdraw a certain petition, a certiorari petition, citing

1 Rees v. Peyton. But, there is no indication that that opinion  
2 -- that that phrase means something different from rational  
3 understanding."

4 What Mr. Pescetta is proposing today is saying  
5 that, as he terms it, a "lay judgment." But, I guess you who  
6 necessarily must be one, cannot make any kind of a factual  
7 finding or determination, and every decision made by a  
8 court --

9 THE COURT: Well, unfortunately, I will have to  
10 make that decision, just as Judge Berry had to make the  
11 decision. Judges do all the time and so do juries.

12 MR. WIELAND: I understand. But what he's saying is  
13 you're incapable of making that decision, just as Judge Berry  
14 was.

15 THE COURT: No, no, I didn't understand the argument  
16 to be that anybody is incapable or anything in the pejorative  
17 sense --

18 MR. WIELAND: No, I didn't offer that pejoratively.

19 THE COURT: Obviously, Mr. Pescetta would like to  
20 elevate to a talismanic level, expert testimony. And it  
21 simply isn't. But, it's helpful. I want to go ahead and get  
22 the record complete, so I understand your objection and --

23 MR. WIELAND: Thank you, Your Honor.

24 THE COURT: And as I've said, I'm not making a  
25 finding that I'm even going to permit, in my determination,

1 the use of what may be testified to. But even if I don't,  
2 and I should turn out to be incorrect in the view of the  
3 Ninth Circuit Court of Appeals, I would think it would be  
4 helpful to them to not have to come back and repeat the  
5 process, and have it taken care of. So, it's just really an  
6 economy.

7 MR. WIELAND: Well, I'm not disputing that,  
8 Your Honor. I'm just voicing my concerns and --

9 THE COURT: All right.

10 MR. WIELAND: -- my objection with respect to this.  
11 I understand what the Court is doing entirely.

12 THE COURT: All right. Great. Thank you.

13 Doctor, come on up then and we'll ask you to be  
14 sworn by the clerk and then proceed with testimony.

15 DR. THOMAS BITTKER,

16 called as a witness, being first duly sworn,  
17 was examined and testified as follows:

18 THE CLERK: Please state your full name, spelling  
19 your last name for the record.

20 MR. DENNIS: My name is Dr. Tom Bittker, spelled  
21 B-i-t-t-k-e-r.

22 THE COURT: Go ahead. You may proceed,  
23 Mr. Pescetta. And you don't need to spend time qualifying  
24 the witness. Obviously he's been qualified and selected  
25 before the state court, and we just want to amplify, or get



1 the testimony concerning the report of November 24th 2003.

2 MR. PESCETTA: Thank you, Your Honor. But since his  
3 experience with depression is somewhat relevant, could I have  
4 him identify his curriculum vitae?

5 THE COURT: Sure. Sure.

6 MR. PESCETTA: May I approach the witness,  
7 Your Honor.

8 THE COURT: Yes. It is proposed exhibit 1, and  
9 certainly we'll receive that, assuming it is what it purports  
10 to be.

11 Is that your C.V., doctor?

12 MR. DENNIS: Yes, it is.

13 THE COURT: Okay. I'll receive exhibit 1.

14 MR. PESCETTA: Thank you, Your Honor.

15 (Whereupon, exhibit 1 -- C.V. of Dr. Bittker, was  
16 marked and received in evidence.)

17 DIRECT EXAMINATION

18 BY MR. PESCETTA:

19 Q. You have, according to your curriculum vitae, a  
20 substantial amount of experience in dealing with patients  
21 with depression, is that correct?

22 A. That is correct.

23 Q. Over how long a period?

24 A. Uh, roughly, good Lord, in excess of 30 years.

25 Q. And has that included patients with suicidal problems?

1 A. Yes, it has.

2 Q. Has it included people who actually managed to commit  
3 suicide?

4 A. Unfortunately, yes.

5 Q. Is part of your expertise as a psychiatrist directed  
6 toward, or recognizing the symptoms of depression that lay  
7 people would not recognize?

8 A. I think we are capable of attaching meaning to behaviors  
9 that others may overlook, yes.

10 Q. So that, in your experience, do patients suffering from  
11 depression, or from any mental illness, sometimes minimize or  
12 exaggerate their symptoms?

13 A. Yes.

14 Q. And that is for their own purposes, irrespective of  
15 whether they're on death row or --

16 MR. WIELAND: Objection. Leading, Your Honor.

17 THE COURT: It was. The last question was leading.  
18 Sustained.

19 MR. PESSETTA: Yes, Your Honor. I withdraw it,  
20 Your Honor.

21 BY MR. PESSETTA:

22 Q. Is there a range of responses from patients as to how  
23 forthcoming they are in terms of reporting symptoms?

24 A. Well, because of the stigma associated with mood  
25 disorders and substance abuse disorders, some people will

1 minimize these in issues such as the case at hand. It would  
2 be understandable that the defendant would want to emphasize  
3 his own competence, and de-emphasize any elements that would  
4 throw that competence into question.

5 Q. Now, you examined Mr. Dennis in November of 2003, right?

6 A. That is correct.

7 Q. And you submitted a report to Judge Berry on, I believe,  
8 November 24th, 2003?

9 A. Yes, I did.

10 Q. And you have a copy of that in front of you?

11 A. Yes.

12 MR. PESCETTA: And that's an exhibit 50, Your Honor.

13 BY MR. PESCETTA:

14 Q. And you conclude -- the conclusions you heard me read  
15 earlier on about your diagnosis that Mr. Dennis suffers from  
16 bipolar-II disorder?

17 A. Yes, I did.

18 Q. And what does that entail?

19 A. Excuse me. Fluctuating moods. It also entails a  
20 primary mood state of depression. It's usually associated  
21 with co-morbid substance abuse problems. It tends to be more  
22 refractory to treatment. And in his case, likely had been  
23 ongoing for more than half of his life.

24 Q. And do you view that condition as continuing?

25 A. Yes, it is. It's a chronic condition. As chronic as,

1 say, hypertension or diabetes may be.

2 Q. Just for us lay people, chronic means it doesn't go  
3 away?

4 A. It is with you. Yes.

5 Q. And have you seen anything in the other materials that  
6 you've seen, specifically in the transcript of the hearing  
7 conducted on December 4th, 2003 which we supplied to you,  
8 which is exhibit 51, that would change your opinion?

9 A. No, I have not. I would also comment in reviewing  
10 information from multiple sources, and also reviewing the  
11 transcript, that, apparently, Mr. Dennis has provided  
12 histories that have either appeared confusing to observers,  
13 or reflect conflicting information. And I think that is  
14 apparent in the transcript as we contrasted with my own  
15 report, as we contrasted with reports of others.

16 Q. Do your patients, in your experience, frequently  
17 misrepresent their histories?

18 A. Well, several elements. Patients can misrepresent  
19 their histories or we, as professionals, may misinterpret  
20 what they say. But there is certainly some conflict in the  
21 reports.

22 Q. In terms of the objections that Mr. Dennis made at  
23 the hearing, the transcript of which you reviewed, were any  
24 of those exceptions that he suggested, well-taken in your  
25 opinion?

1 A. Well, certain points that were a problem of my own  
2 syntax. I referred to a series of offenses that commenced in  
3 South Dakota. I did not intend to imply that all the offenses  
4 occurred in South Dakota, but just the initial one, according  
5 to Mr. Dennis, occurred there.

6 I made some references to his rank when he was in  
7 the armed services. That may or may not have been in error.  
8 That's what I recorded.

9 Beyond that, I don't think there was any substantive  
10 difference between what he reported to me and what I remember  
11 and what I wrote about. I think the fundamental issues  
12 remain in place. He suffers from significant substance  
13 abuse problems that are now contained because he's in an  
14 institution. And he suffers from a very significant bipolar  
15 disorder, ongoing I believe, and which colors his judgment.

16 Q. Now, in terms of his own self-awareness, or his own  
17 insight into the affects of his mental illness, do you have  
18 an opinion about whether people who suffered from this  
19 disorder are always aware of the effect that it has on them?

20 A. I have an opinion that some people have more insight  
21 than others. I actually think that Mr. Dennis has rather  
22 significant intellectual insight into what's going on with  
23 him. He obviously represents himself as a very bright,  
24 articulate man and an excellent advocate. I don't think he --  
25 I'm not convinced that he fully discloses all that transpires

1 within him, and I believe some of his remarks are self-serving  
2 toward his own end, which is, I think, a longstanding  
3 commitment to die.

4 Q. So in your report on page 2 of exhibit 50, you report  
5 that he asserted that he had an "idyllic childhood," is that  
6 correct?

7 A. That was his initial response, yes.

8 Q. And is that what you represented, and that's what he  
9 told you at that time?

10 A. Well, it is unclear whether he represented that in a  
11 sarcastic way or he was initially willing to gloss over  
12 what I would consider significantly traumatic events in his  
13 childhood.

14 Q. Which included what, doctor?

15 A. Well, actually it included several things. The  
16 defendant was without a biological mother within a year  
17 following his birth. He didn't know his father. His  
18 father abandoned his mother prior to birth. He suffered  
19 significant beatings at the hands of his stepfather, rather  
20 brutal beatings with a belt and with a fist. Reports that his  
21 adoptive mother began to engage with him sexually as a very  
22 young boy and, ultimately, she died when he was 12 years old.

23 He had a rather checkered school performance. His  
24 disturbance was so great that he was fire setting as a youth.  
25 He had a negative reaction to his adoptive brother. And, he

1 began a series of offenses at age of 15.

2 I would not say that's an idyllic childhood. I  
3 would say that's a heavily traumatized childhood.

4 Q. In your opinion, doctor, is Mr. Dennis fully aware of  
5 the effect of that childhood trauma on his ability to respond  
6 rationally?

7 A. I think he has an intellectual awareness of that  
8 childhood trauma. He reported that childhood trauma to me,  
9 which would indicate that he himself has some knowledge  
10 sufficient to highlight it. I don't think Mr. Dennis is  
11 fully aware of how that trauma affected his identity, and how  
12 that subsequently led to a course of events that has resulted  
13 in his conviction and his current life decisions.

14 Q. How long ago do you think, in your opinion, did  
15 Mr. Dennis begin to be chronically depressed?

16 A. Well, I think his depression probably began with the  
17 time of his abuse. But when it first became clinically  
18 recognized within my ordinance, is when he was discharged  
19 from the service. According to the records of his discharge,  
20 he was discharged because he was, quote, suicidal. So, I  
21 would say sometime in his early twenties it came to the  
22 attention of professionals.

23 Q. And how long do you think, in your opinion, has  
24 Mr. Dennis had this desire to die?

25 A. Well, he acknowledges, depending on who you read and

1 what report you honor, between four and twelve suicide  
2 attempts in his life. He acknowledges feeling, according to  
3 him, intensely homicidal following the death of a roommate in  
4 the two weeks prior to the instant offense. He acknowledges  
5 attempting to seek treatment in that interval, unsuccessfully,  
6 from the V.A.

7 I read his post-offense behavior, first of all,  
8 boasting he was a serial killer; secondly, if you read  
9 the report about what he said about the victim, it was  
10 almost an attempt to provoke retaliation on the part of the  
11 state. His response in terms of not really seeking any viable  
12 defense, and his ready acquisition to the death penalty, to  
13 me, indicates a fulfillment of his desire, which I think is  
14 motivated by his depression, his desire to die. In effect, as  
15 he confessed to me, that he didn't have the courage to carry  
16 through the desire, so the state becomes his vehicle for  
17 suicide. And I think this is a direct consequence of his mood  
18 disorder.

19 Q. And the mood disorder is the mental disorder that you  
20 diagnosed?

21 A. That's as best we can represent it. He has  
22 poly-substance abuse, and he has a bipolar disorder, and  
23 mostly he has a core identity that says that he's not worth  
24 much, he deserves to die. And I believe he felt that way  
25 prior to the instant offense.



1 Q. Now, does the fact that Mr. Dennis is adamant, and  
2 apparently lucid in expressing his will to be executed, his  
3 desire to be executed, in your opinion, is that inconsistent  
4 with his -- with the theory that his choice is, in fact, being  
5 motivated by his mental disorder?

6 A. I think one clue that the court has regarding the  
7 rationality of his decision, is the lack of ambiguity about  
8 death, and the almost obsessive insistence that he does die.  
9 That is not normal. That's reflective of almost a -- it  
10 isn't, I wouldn't call it delusional, but a fixed idea that  
11 must be fulfilled. That's not a product, necessarily, of  
12 rational thinking. It's the product of rigidity. And it is a  
13 product of his disorder.

14 But, if you're asking the question is he demented?  
15 Absolutely not. Is he delirious? No. Is he psychotic? No.

16 Q. Well, doctor, have you treated patients who have  
17 attempted --

18 THE COURT: Well, let me interrupt you. Sorry.

19 Does the condition, the disease or defects that  
20 you find in Mr. Dennis, do those conditions, in your opinion,  
21 prevent him from making a rational choice regarding the  
22 options that are available to him; to choose either to waive  
23 appeals and go forward with execution three weeks hence, or to  
24 pursue appeals for whatever purpose they may avail him, for  
25 good or for bad down the road?

1 THE WITNESS: Your Honor, let me acknowledge this.  
2 There is nothing in the diagnosis, the DSM-IV diagnosis about  
3 bipolar type II disorder that talks about fixed suicidal  
4 ideation. We do acknowledge that suicidal ideation is a  
5 component of depression.

6 Mr. Dennis' behavior for the past several years,  
7 prior to and including the instant offense, begins with the  
8 fixed idea that he deserves and wants to die.

9 THE COURT: Right.

10 THE WITNESS: I see that as a product of the  
11 uniqueness of Mr. Dennis, but a product of a mental disorder.  
12 His thinking and his behavior springs from his mood. It  
13 doesn't spring from the interaction with the environment.  
14 There is nothing that this court is going to do that will  
15 dissuaded him from the way that he insists on dying because he  
16 deserves to die. And it isn't as he necessarily represents,  
17 an issue of the law of "an eye for eye." It's an issue that  
18 he believes that he is worthless and deserves to die and wants  
19 to die. It's the one power that he has. He has no other  
20 power in his life other than to determine his desire for  
21 death.

22 THE COURT: And in your judgment, is that, is  
23 he capable of volitionally making a rational decision in  
24 that regard?

25 THE WITNESS: I believe in this case, this is the

1 one area where I don't think it is a volitional decision. I  
2 think it's a fixed decision that has been sustained since the  
3 instant offense and before.

4 THE COURT: All right.

5 BY MR. PESCETTA:

6 Q. And so, in your opinion, doctor, would you say that  
7 Mr. Dennis' position with respect to this litigation is  
8 indistinguishable from his position with respect to the,  
9 either 4 or 12 suicide attempts that he made while he was at  
10 liberty?

11 A. I would say it is distinguishable, counsel. I think  
12 it's distinguishable in its resoluteness. I think the  
13 prior suicide attempts may have been associated with some  
14 ambivalence. This one is not.

15 Q. But it is your testimony, as I understand your answer to  
16 His Honor's question, that you believe that this decision  
17 on his part is in fact a product of his mental disorder?

18 A. Yes.

19 MR. PESCETTA: I think that's all I have,  
20 Your Honor.

21 THE COURT: All right. Thank you.

22 Mr. Wieland, do you have any questions?

23 MR. WIELAND: May I have just a moment, Your Honor?

24 THE COURT: Sure.

25 CROSS-EXAMINATION

1 BY MR. WIELAND:

2 Q. Hopefully, very briefly, doctor.

3 Do you hold that anyone that wants to drop his  
4 appeals and be executed pursuant to a judgment in the state  
5 court would necessarily be suicidal?

6 Is that what your opinion is?

7 A. No.

8 Q. Do you have a copy of exhibit 50, your report there --

9 A. Yes.

10 Q. -- that you gave to Judge Berry?

11 A. That is correct.

12 Q. Okay. Directing your attention to page 8.

13 A. Yes.

14 Q. Okay. You made responses to Judge Berry's order:

15 "As to the specific questions raised by the court,  
16 my responses are as follows, colon, one, two, three, four."

17 A. I believe that he met all of the Dusky criteria for  
18 competence as she outlined, yes.

19 Q. And you stand by that today, is that correct?

20 A. Yes, I do.

21 Q. Did you -- now, perhaps I misunderstood Mr. Pescetta,  
22 but I understood you to have read some additional materials  
23 since you made this report, is that correct?

24 A. Mr. Pescetta provided me a transcript of the hearings  
25 with doctor -- I'm sorry, with Judge Berry, and also provided

1 me with at least an abstract of the Rees decision, the  
2 1996 (sic.) decision that was discussed.

3 Q. Oh, okay. So I gather that you and Mr. Pescetta  
4 discussed this matter before you testified, is that correct?

5 A. That is accurate.

6 Q. So, your testimony is designed to jam this sort of stuff  
7 into what you perceive or what Mr. Pescetta perceives to be  
8 the Rees decision, is that correct?

9 A. No. You use the word "jam." My understanding of this  
10 hearing is to give --

11 Q. I'm not asking what your understanding is, sir.

12 Was your testimony designed to be tailored to fit  
13 Mr. Pescetta's idea of what the Rees decision stood for?

14 A. No.

15 Q. Then why did you talk to Mr. Pescetta about this if you  
16 had your previous opinion?

17 A. I'm sorry?

18 Q. If you had already stated to the Court what you believed  
19 to be the case, then why were you talking to Mr. Pescetta at  
20 all, and why did he provide you with an abstract of the Rees  
21 decision?

22 A. Mr. Pescetta approached me. I didn't approach  
23 Mr. Pescetta.

24 Q. I understand that to be the case, sir, but you obviously  
25 had a discussion somehow or another about what Mr. Pescetta

1 thought the Rees decision stood for, is that correct?

2 A. Yes, sir, I did.

3 Q. And Mr. Pescetta asked you certain questions with  
4 respect to what he represented to you to be the Rees decision,  
5 is that correct?

6 A. May I respond to the question, in a way that I think I  
7 understand the question to be?

8 THE COURT: Yes. Go ahead.

9 THE WITNESS: Okay. What Mr. Pescetta explained to  
10 me was that although my report, the initial four elements in  
11 response to Judge Berry's requests were very specifically  
12 tailored to respond to the Dusky criteria, he pointed out  
13 that my last several paragraphs where I talked about how I  
14 viewed Mr. Dennis' decision to be a product of chronic and  
15 ongoing suicidal thinking, might qualify, according to the  
16 Rees decision. And he provided me that. In that sense, we  
17 have just taken my initial report and allowed this court to  
18 hear that vis-a-vis Mr. Pescetta's perspective in the Rees  
19 decision.

20 So, no, it wasn't tailored. I don't think anything  
21 has fundamentally changed in that report. It's pretty much  
22 the same thing I said in November of 2003.

23 MR. WIELAND: May I have just a moment, please,  
24 Your Honor?

25 THE COURT: Sure.

1 MR. WIELAND: That's all the questions I have,  
2 Your Honor.

3 THE COURT: Thank you.  
4 Anything else, Mr. Pescetta?

5 MR. PESCETTA: Very briefly, Your Honor.

6 MR. WIELAND: Excuse me. May I --

7 THE COURT: Yes. Go ahead.

8 MR. WIELAND: -- may I have just one other question?

9 THE COURT: Yes.

10 BY MR. WIELAND:

11 Q. Was it just those two documents that you were provided;  
12 the Rees decision and the sentencing transcript?

13 A. Excuse me. I'll just provide for you what the documents  
14 were. I was, of course, provided for the subpoena for my  
15 appearance here.

16 Q. Certainly.

17 A. A letter, a cover letter authored by Mr. Pescetta  
18 outlining what he was providing for me. The transcripts of  
19 proceedings of December 4th, 2003. The execution order.

20 Yes. Those are the only additional documents.

21 Q. May I see the letter that Mr. Pescetta sent to you,  
22 please.

23 THE COURT: Sure.

24 MR. WIELAND: May I approach, Your Honor?

25 THE COURT: You may.

1 THE WITNESS: There you go.

2 MR. WIELAND: Thank you.

3 Your Honor, I would request that a copy of this  
4 letter be made part of the record and admitted as an exhibit.

5 THE COURT: Exhibit 2. All right. We'll go ahead  
6 and ask the clerk to make a photocopy of that and receive it.

7 MR. PESCETTA: I have no objection.

8 THE COURT: Sure.

9 (Whereupon, exhibit 2 -- a letter, was marked and  
10 received in evidence.)

11 MR. WIELAND: Your Honor, I would request the  
12 Court note that Mr. Pescetta's letter in there says that he's  
13 challenging this on the basis of making a rational choice as  
14 opposed to a volitional choice.

15 THE COURT: All right.

16 MR. WIELAND: May I just have another moment,  
17 Your Honor?

18 THE COURT: You bet.

19 MR. WIELAND: Your Honor, at this time, I really do  
20 have no further questions of the witness.

21 THE COURT: Thank you.

22 Mr. Pescetta, come on up if you have anything else.

23 While Mr. Pescetta is coming up, doctor, am I  
24 correct in understanding that you have not had contact with  
25 Mr. Dennis, at least since the examination interviews in



1 November of 2003?

2 THE WITNESS: Other than in this courtroom.

3 THE COURT: Other than in the courtroom.

4 THE WITNESS: That is correct.

5 THE COURT: Okay. Thank you. Go ahead.

6 REDIRECT EXAMINATION

7 BY MR. PESCETTA:

8 Q. Doctor, we've retained you, haven't we?

9 A. Yes, sir.

10 Q. Was it at your standard hourly rate?

11 A. Yes, sir.

12 Q. And your rate for testimony that you give to lawyers  
13 generally?

14 A. Yes, sir.

15 Q. And looking at the list of cases attached to your C.V.,  
16 it would appear to me that you testify on behalf of the  
17 prosecution at least as often as on behalf of the defense.

18 A. I would say a majority of the my cases are for the  
19 prosecution, yes.

20 Q. And do you recall a case involving Arrata-Beta  
21 (phonetic) --

22 MR. WIELAND: Your Honor, I'm going to object. It's  
23 beyond the scope of cross.

24 THE COURT: What is -- how is it even germane?

25 MR. PESCETTA: Well, the implication that I think

1 counsel was making was that we had "jammed" Dr. Bittker's  
2 testimony into something that we wanted him to say.

3 THE COURT: No, no, he's already answered. He's  
4 given a perfectly complete answer to that question. I don't  
5 want to get into some other case.

6 MR. PESSETTA: Fine, Your Honor.

7 BY MR. PESSETTA:

8 Q. You didn't testify at the hearing on December 4th, 2003,  
9 is that correct?

10 A. That's correct.

11 Q. And if you had testified, you would have testified as  
12 you have in front of His Honor in this proceeding?

13 A. If allowed to do so, yes.

14 Q. And would you have explained --

15 MR. WIELAND: Your Honor, I'm going to object.  
16 That's clearly beyond the scope.

17 THE COURT: No. Overruled. I'll let that answer,  
18 the last answer stand.

19 BY MR. PESSETTA:

20 Q. And would have you explained to Judge Berry that, for  
21 instance --

22 THE COURT: Now, you don't have to repeat that. He  
23 said his testimony would be, assuming he was asked the same  
24 questions, his answers would be the same. Am I correct?

25 THE WITNESS: That is correct.

1 BY MR. PESCETTA:

2 Q. And that is that Mr. Dennis' adamance about insisting  
3 on being executed is not in fact a sign of lucidity and  
4 rationality but, in your to the contrary?

5 MR. WIELAND: Objection. Leading.

6 THE COURT: It is leading, but the witness has  
7 already testified. There's no need to repeat it,  
8 Mr. Pescetta. You're just saying it over and over.

9 MR. PESCETTA: I'm just trying to get this nailed  
10 down for the record, Your Honor.

11 THE COURT: Well, I think the record is the record.  
12 As many times as you ask the question, I suppose different  
13 words can be used. I don't know if that cleans up the record.  
14 It maybe confuses the record.

15 MR. PESCETTA: In that case, Your Honor, I think  
16 I'll quit.

17 THE COURT: All right.

18 MR. PESCETTA: Thank you, Your Honor.

19 THE COURT: Anything further then, Mr. Wieland?

20 MR. PESCETTA: Thank you, Your Honor.

21 MR. WIELAND: Nothing, Your Honor.

22 THE COURT: Lia, go ahead and get a copy of that  
23 letter if you would, please. And then we'll get that back to  
24 you, doctor.

25 THE COURT: Thank you.

1 THE WITNESS: Your Honor, thank you.

2 THE COURT: All right. Then, Mr. Pescetta, let me  
3 finally hear anything you would add. And then I'll hear  
4 Mr. Wieland. And then, of course, anything Mr. Dennis, in  
5 conclusion, wishes to raise.

6 MR. PESSETTA: I think you've heard enough from me  
7 for today, Your Honor. I would just reiterate that I think  
8 Dr. Bittker's testimony shows that had he testified in the  
9 state proceeding, it is clear that he would have explained  
10 to Judge Berry lay assumptions about demeanor and about  
11 Mr. Dennis -- about whether Mr. Dennis' motivation is in fact  
12 a result of his mental illness as opposed to free, voluntarily  
13 volition, would be different. And that is why that state  
14 proceeding was inadequate for you to give deference to it.  
15 And that is why Your Honor should find that Ms. Butko does  
16 have standing, because Mr. Dennis does not have the ability  
17 to make that rational choice.

18 THE COURT: Does your argument change at all if I  
19 were to construe Rumbaugh, or cases that have addressed  
20 Rumbaugh in this circuit as refining or clarifying the Rees  
21 standard which is referenced in Whitmore, with regard to the  
22 three prongs there? Does it alter your argument one bit?

23 MR. PESSETTA: Just to be blunt, Your Honor, simply,  
24 no. It's our position that the doctor has testified. He is  
25 the -- and this is unique amongst all of the cases that have

1 been cited by us and by the state. The only case that we  
2 have been able to find where the only recent examination by  
3 a mental health professional -- and, here, a mental health  
4 professional who is an expert on depression -- has said that  
5 this decision is a product of mental illness. And I think  
6 that concludes the inquiry, whether its under Rees, whether we  
7 review -- whether we view Rumbaugh or Whitmore as refining  
8 Rees, it is our position that that's the only evidence that is  
9 before Your Honor, and that that controls the evidence.

10 THE COURT: All right. Thank you.

11 MR. PESCETTA: Thank you, Your Honor.

12 THE COURT: Thank you.

13 Mr. Wieland, anything in closing?

14 MR. WIELAND: Not too much, Your Honor. It's our  
15 position they don't even get to that point.

16 If you extend Mr. Pescetta's argument logically,  
17 then necessarily this court can't make any determination  
18 at all with respect to Mr. Dennis' competence today.  
19 Necessarily, this court would have to have some sort of a  
20 psychiatric evaluation of Mr. Dennis, and simply could not  
21 rely on its own perceptions, on its own eyes, on what it has  
22 heard. What it does is it necessarily means that in any  
23 proceeding, a guilty plea, any proceeding at all, where an  
24 individual has, you know, any sort of mental problem or  
25 whatever, there's got to be some sort of a psychiatric

1 evaluation. And not only that, the court has to accept it.  
2 The court has to accept it.

3 I note as well that Judge Berry noted the  
4 discrepancy between what Mr. Dennis supposedly told, or  
5 what Mr. Bittker, Dr. Bittker reported with respect to  
6 the auditory hallucinations and stuff, and she credited  
7 Mr. Dennis.

8 Mr. Pescetta is arguing, you know, at best, he's  
9 arguing a second prong which you don't even reach, which this  
10 court can't even reach.

11 Your Honor, as we note in our motion to dismiss, not  
12 only is there a failing of any kind of a demonstration that  
13 Mr. Dennis is incompetent, they haven't met either of the  
14 other two prongs with respect to the Whitmore case.

15 THE COURT: All right.

16 MR. WIELAND: And that being the case, this court  
17 is precluded from granting Ms. Butko or the Federal Public  
18 Defender or whomever, of standing in this case.

19 THE COURT: All right. Thank you.

20 Mr. Dennis, let me finally return to you because  
21 having heard the arguments and testimony, I'm going to be  
22 tasked with making a decision, which I will do very shortly.  
23 It will be a written ruling based upon what has proceeded.  
24 But you, of course, have been present during all of the  
25 proceedings. Is there anything that has either been argued

1 or testified to by anyone in the courtroom that changes in any  
2 way, the desires you previously expressed that you wish to  
3 not proceed with further legal challenges to the sentencing  
4 that has been imposed, and that you wish to proceed with the  
5 execution as scheduled on July 22nd?

6 Is there anything that's changed your desires or  
7 wishes in that regard?

8 MR. DENNIS: No, Your Honor.

9 THE COURT: All right. Anything else that you want  
10 to add then based upon what has been presented or argued?

11 MR. DENNIS: If I may.

12 THE COURT: Sure.

13 MR. DENNIS: There's this issue of competency and  
14 depression and what does or does not make a person incompetent  
15 as far as, you know, making these decisions. I think more  
16 than one opinion certainly should be called for, and not  
17 just have one psychiatrist, psychologist, or whatever come in,  
18 put out his opinion -- and it is that -- you know, objective  
19 or subjective, and that be the grounds for the whole, you  
20 know, presentation. I just think that ought to be changed.

21 THE COURT: All right.

22 All right. Well, with that, the matter will stand  
23 submitted. It's my intention to have a ruling just as quickly  
24 as I can. I fully appreciate the timing that we're dealing  
25 with here. As I said earlier, whatever ruling is issued,

1 there obviously will be additional, the potentiality for  
2 additional proceedings in connection with that. And I  
3 certainly don't want to delay that. I'll endeavor to have a  
4 ruling just as quickly as I can, certainly by -- Monday being  
5 a holiday -- certainly by next Tuesday would be my goal.

6 All right. Thank you very much everyone.

7 MR. WIELAND: Thank you, Your Honor.

8 MR. PESNETTA: Thank you, Your Honor.

9 (Court Adjourned.)

10 I certify that the foregoing is a correct transcript from  
11 the record of proceedings in the above-entitled matter.

12 Kathryn French  
13

14 KATHRYN M. FRENCH, RPR, CCR

7-2-04

DATE

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INDEX OF EXAMINATION



1     WITNESSES:                 DIRECT   CROSS   REDRCT   RECRS   VOIR  
  DIRE

2 | 1) DR. THOMAS BITTKER

3 By Mr. Pescetta

4 By Mr. Wieland

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## INDEX OF EXHIBITS

<u>EXHIBIT NO.</u>	<u>MARKED</u>	<u>RECEIVED</u>
Exhibit 1 -- C.V. of Dr. Bittker	55	55
Exhibit 2 -- letter	70	70

*Law Offices of the Federal Public Defender*

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*Las Vegas, Nevada 89101*

*Tel: 702-388-6577*

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Federal Public Defender  
District of Nevada*

*Michael J. Kennedy  
First Assistant*

*John C. Lambrose  
Chief, Appellate/Habeas Division  
Michael Pescetta  
Chief, Capital Habeas Division*

June 24, 2004

VIA FEDERAL EXPRESS DELIVERY

Thomas E. Bittker, M.D.  
Mental Health Medical Associates  
80 Continental Drive, Suite 200  
Reno, Nevada 89509

Re: Dennis v. McDaniel, Case No. CV-S-04-0798-PMP-RJJ

Dear Dr. Bittker:

Our office is prosecuting a next friend petition on behalf of Terry Dennis, on the ground that he is not capable of making a rational decision to abandon further litigation of his capital case. The Federal District Court has scheduled a hearing on the matter for Thursday, July 1, 2004, at 1:30 p.m. In preparation for that hearing, I would appreciate it if you would review the following materials:

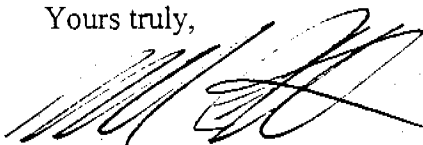
1. Transcript of Proceedings, Second Judicial District Court, Case No. CR99P0611, December 4, 2003. This was a hearing in which your report (dated November 24, 2003, a copy of which I also enclose for your convenience) was discussed, and in which Mr. Dennis made a number of assertions about the accuracy of the report.
2. Memorandum with respect to standing, United States District Court Case No. CV-S-04-0794-PMP-RJJ, filed June 14, 2004. This is our legal argument with respect to the issue of Mr. Dennis' competence to waive further procedures. At pages 13-17, we discuss some of the factual assertions made by Mr. Dennis in the Washoe County hearing, and at pages 9-11 we discuss the legal standard of competence applicable to this proceeding.
3. Copy of Rees v. Pevton, 384 U.S. 312 (1966) (per curiam), which states what we believe is the appropriate standard. In Rees, the Supreme Court stated the standard as whether the individual can "make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises." 384 U.S. at 314. It is our position that your report, in which you

Thomas E. Bittker, M.D.  
Mental Health Medical Associates  
June 24, 2004  
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conclude that Mr. Dennis' decision to seek execution is "directly a consequence of the suicidal thinking and his chronic depressed state," Report at 8, establishes that Mr. Dennis is not competent under the Rees standard.

I understand that you will not be in your office until Tuesday, June 29, 2004. I would greatly appreciate it if you would call me, at (702) 388-6577, as soon as you can. I am not sure whether we could retain you, or whether we would have to subpoena you as a fact witness, but I would like to discuss the matter with you as soon as you return.

Yours truly,

A handwritten signature in black ink, appearing to read 'Michael Pescetta', with a stylized, overlapping flourish at the end.

Michael Pescetta  
Assistant Federal Public Defender

MP/dj  
Enclosures

THOMAS E. BITTKER, MD, LTD.

CURRICULUM VITAE

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RENO, NV 89509  
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PERSONAL INFORMATION:

- BIRTH DATE: MARCH 24, 1940
- BIRTHPLACE: DETROIT, MICHIGAN

CURRENT POSITION:

- PRIVATE PRACTICE  
MENTAL HEALTH MEDICAL ASSOCIATES  
FORENSIC AND CLINICAL PSYCHIATRY
- CLINICAL PROFESSOR OF PSYCHIATRY, UNIVERSITY OF NEVADA, RENO  
FACULTY, NATIONAL JUDICIAL COLLEGE, RENO, NEVADA
- TEACHING FACULTY FOR PHARMACEUTICAL INDUSTRY:

ABBOTT LABS	1999 TO PRESENT
ASTRA-ZENeca PHARMACEUTICALS	2001 TO PRESENT
BRISTOL-MYERS SQUIBB CORP.	1996 TO PRESENT
CEPHALON PHARMACEUTICALS	
FOREST LABS	1999 TO PRESENT
ORGANON PHARMACEUTICALS	1998 TO PRESENT
Pfizer LABS	1997 TO PRESENT
Wyeth LABS	1996 TO PRESENT
GLAXO PHARMACEUTICALS	1992 TO PRESENT
SMITHKLINE BEECHAM	1990 TO PRESENT
LILLY PHARMACEUTICALS	1990 TO PRESENT
NOVARTIS	2001 TO PRESENT

PROFESSIONAL EXPERIENCE:

- MEDICAL DIRECTOR, WEST HILLS HOSPITAL, RENO, NEVADA  
SEPTEMBER 1990 TO 2000
- ACTING MEDICAL DIRECTOR, ADOLESCENT UNIT, WEST HILLS HOSPITAL,  
RENO, NEVADA  
1991 TO OCTOBER 1996
- CLINICAL PROFESSOR OF PSYCHIATRY, UNIVERSITY OF NEVADA/RENO  
SCHOOL OF MEDICINE, DEPARTMENT OF PSYCHIATRY  
1990 TO PRESENT
- PRIVATE PRACTICE IN PSYCHIATRY IN AFFILIATION WITH SCOTTSDALE CLINIC  
1996 TO 1990
- DIRECTOR, DIVISION OF BEHAVIORAL HEALTH SERVICES, STATE OF ARIZONA  
1986 TO 1988

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THOMAS E. BITTKER, MD, LTD.  
CURRICULUM VITAE - PAGE 2

- RESPONSIBLE FOR ALL ASPECTS OF LEADERSHIP AND MANAGEMENT OF A STATEWIDE COMPREHENSIVE MENTAL HEALTH AND CHEMICAL DEPENDENCY PROGRAM INCLUDING SUPERVISION OF THE STATE HOSPITAL, COORDINATION OF SERVICES IN COMMUNITY MENTAL HEALTH CENTERS, PREPARATION AND PRESENTATION OF BUDGET AND STRATEGIC PLAN TO THE GOVERNOR OF ARIZONA AND TO THE LEGISLATURE.
- ASSISTANT DIRECTOR, DEPARTMENT OF HEALTH SERVICES, DIVISION OF BEHAVIORAL HEALTH SERVICES. DUTIES: DEVELOP AND MANAGE, WITH LEGISLATIVE AND GUBERNATORIAL ENDORSEMENT, MANAGEMENT TEAM, POLICIES AND PROCEDURES, AND CONTRACTING PROGRAMS IN BEHALF OF THE BEHAVIORAL HEALTH SERVICES FOR A STATE OF 3,200,000 PEOPLE. RESPONSIBLE FOR ALL ASPECTS OF STATE-FUNDED BEHAVIORAL HEALTH OPERATIONS, INCLUDING THE ARIZONA STATE HOSPITAL SYSTEM, A STATE-RUN MODEL MENTAL HEALTH CENTER, AND STATE CONTRACTED COMMUNITY BEHAVIORAL HEALTH PROGRAM. ESTABLISHED THE FOUNDATION FOR A COMPREHENSIVE PROGRAM FOCUSED ON THE NEEDS OF THE STATE'S CHRONICALLY MENTALLY ILL. RESPONSIBLE FOR 1,200 EMPLOYEES AND A BUDGET IN EXCESS OF \$70,000,000 (JUNE 1986 TO MARCH 15, 1988).
- PART-TIME OUTPATIENT PRIVATE PRACTICE. INDEPENDENT CONSULTANT FOCUSED ON ALL ASPECTS OF PREPAID BEHAVIORAL HEALTH SERVICES DELIVERY (JULY 1986 TO 1990).
- CONSULTANT TO CAMELBACK HOSPITAL HEALTH SYSTEMS CONSULTING FIRM, SPECIALIZING IN PROBLEMS OF BEHAVIORAL HEALTH SYSTEMS DEVELOPMENT (MARCH 15, 1988 TO 1990).
- MEDICAL DIRECTOR AND EXECUTIVE VICE PRESIDENT FOR MEDICAL AFFAIRS AT THE CIGNA HEALTHPLAN OF ARIZONA, (1985 - 1986). DUTIES INCLUDED SUPERVISING ALL ASPECTS OF MEDICAL ACTIVITIES, QUALITY ASSURANCE, BUDGET AND PLANNING FOR A 200,000 MEMBER HMO. ALSO, ASSUMED RESPONSIBILITY FOR THE MANAGEMENT OF 200 SALARIED PHYSICIANS AND DEVELOPED CONSULTING CONTRACTS WITH OUTSIDE PHYSICIANS AND PHYSICIAN CONTRACTORS.
- MEDICAL DIRECTOR, WESTERN REGION, CIGNA HEALTHPLAN OF ARIZONA (1983-85). DUTIES INCLUDED SUPERVISION OF ALL MEDICAL ACTIVITIES FOR AREA ENCOMPASSING 80,000 MEMBERS WITH 60 PHYSICIANS IN FIVE HEALTH CARE CENTERS.
- DIRECTOR OF THE DIVISION OF BEHAVIORAL HEALTH SERVICES, STATE OF ARIZONA (1986 THROUGH 1988).
- EXECUTIVE VICE PRESIDENT AND SENIOR MEDICAL DIRECTOR, ARIZONA HEALTH PLAN (1984 THROUGH 1986).
- SERVED AS LEAD PSYCHIATRIST FOR THE ARIZONA HEALTH PLAN (1974 THROUGH 1986).
- MEDICAL DIRECTOR, WESTERN REGION OF CIGNA HEALTHPLAN OF ARIZONA (1982 THROUGH 1984).
- DIRECTOR OF QUALITY ASSURANCE FOR CIGNA HEALTHPLAN (MERGED ENTITY FROM THE PREVIOUS ARIZONA HEALTH PLAN) (1980 THROUGH 1982).
- DIRECTOR OF HEALTH MAINTENANCE SERVICES (1976 THROUGH 1980).

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THOMAS E. BITTKER, MD, LTD.  
CURRICULUM VITAE - PAGE 3

- CHAIRMAN OF THE DEPARTMENT OF PSYCHIATRY (1974 THROUGH 1980).
- HONORABLY DISCHARGED FROM THE US PUBLIC HEALTH SERVICE, RETAINING RANK OF COMMANDER (RESERVES) (1974).
- STAFF PSYCHIATRIST AND PSYCHIATRIC CONSULTANT TO THE PHOENIX INDIAN MEDICAL CENTER AND US PUBLIC HEALTH SERVICE OFFICER (LT. COMMANDER) (1972 THROUGH 1974).
- RESEARCH FELLOW AT THE NATIONAL INSTITUTE OF MENTAL HEALTH (1971 THROUGH 1972).
- RESIDENT IN PSYCHIATRY AT STANFORD UNIVERSITY MEDICAL CENTER, COMPLETION OF RESIDENCY IN JUNE 1971 (1968 THROUGH 1971).
- US PUBLIC HEALTH SERVICE OFFICER ASSIGNED TO THE PEACE CORPS IN THE REPUBLIC OF NIGER. RANK AT DISCHARGE WAS LT. COMMANDER. (1966 THROUGH 1968).

EDUCATION:

- UNIVERSITY OF MICHIGAN, HISTORY/PRE-MEDICINE, 1957 - 1961, BA DEGREE.
- UNIVERSITY OF MICHIGAN MEDICAL SCHOOL, 1961 - 1964, MD DEGREE.
- STANFORD UNIVERSITY, ANTHROPOLOGY, JUNE 1971, MA DEGREE.

INTERNSHIP:

- UNIVERSITY OF OREGON MEDICAL SCHOOL, HOSPITAL AND CLINICS (ROTATING INTERNSHIP), PORTLAND, OREGON, 1965 - 1966.

RESIDENCY:

- STANFORD UNIVERSITY MEDICAL CENTER, DEPARTMENT OF PSYCHIATRY, PALO ALTO, CALIFORNIA, 1968 - 1971.

BOARD CERTIFICATION:

- AMERICAN BOARD OF PSYCHIATRY, OCTOBER 1973.
- AMERICAN BOARD OF MEDICAL MANAGEMENT, 1989.
- DIPLOMATE IN FORENSIC PSYCHIATRY, AMERICAN BOARD OF PSYCHIATRY AND NEUROLOGY, JUNE 1998.
- PASSED SPECIALTY LICENSE EXAM (C-SPEX), APRIL 1990.

OTHER CERTIFICATIONS, ELECTIVE SOCIETIES, AND HONORS:

- GRADUATED WITH DISTINCTION FROM UNDERGRADUATE AND MEDICAL SCHOOLS.
- ALPHA OMEGA ALPHA, 1965.
- PHI KAPPA PHI, 1965.
- FACULTY MEMBER OF THE YEAR, MARICOPA COUNTY HOSPITAL PSYCHIATRIC RESIDENCY TRAINING PROGRAM, 1980.
- DISTINGUISHED PUBLIC SERVICE MEDAL, MARICOPA COUNTY MEDICAL SOCIETY, FOR WORK PERFORMED WITH ARIZONA MEDICAL ASSOCIATION PHYSICIANS HEALTH COMMITTEE, JANUARY 1981.
- FELLOW, AMERICAN PSYCHIATRIC ASSOCIATION, 1984 TO PRESENT.
- MEMBER, AMERICAN COLLEGE OF PSYCHIATRISTS, 1984.
- FELLOW, AMERICAN COLLEGE OF PHYSICIAN EXECUTIVES, 1986.
- REGULAR RECIPIENT OF CALIFORNIA MEDICAL ASSOCIATION CONTINUING EDUCATION AWARD.
- DISTINGUISHED FELLOW, AMERICAN PSYCHIATRIC ASSOCIATION, 2003.
- DISTINGUISHED LIFE FELLOW, AMERICAN PSYCHIATRIC ASSOCIATION, 2004.

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**RESEARCH POSITIONS:**

- 1963 - 1965 RESEARCH FELLOW, MENTAL HEALTH RESEARCH INSTITUTE, UNIVERSITY OF MICHIGAN. COLLABORATED WITH THE LATE JOHN C. POLLARD IN PERFORMING RESEARCH ON PSYCHOPHYSIOLOGY WITH PARTICULAR ATTENTION TO THE INTERACTION BETWEEN STRESS AND HYPERTENSION.
- 1971 - 1972 NATIONAL INSTITUTE OF HEALTH, ADULT PSYCHIATRY BRANCH. COLLABORATED WITH MONTE BUCHSBAUM, MD, AND ADOLPH PFEFFERBAUM, MD, IN A VARIETY OF RESEARCH EFFORTS EMPLOYING CORTICAL EVOKED RESPONSE STUDIES.
- 1974 - 1975 CLINICAL RESEARCH ON IMPAIRMENT IN PHYSICIANS.
- 1974 - 1982 A VARIETY OF RESEARCH ENDEAVORS EXPLORING THE INTERACTION BETWEEN HEALTH CARE SYSTEM DESIGN AND TREATMENT OUTCOME IN PSYCHIATRIC PATIENTS.

**PAST CONSULTING, COMMUNITY ACTIVITIES, BOARD POSITIONS, AND TEACHING APPOINTMENTS:**

- ASSOCIATE CLINICAL PROFESSOR OF PSYCHIATRY FOR UNIVERSITY OF ARIZONA, 1974 - 1989.
- EXECUTIVE COUNCIL OF THE PHOENIX PSYCHIATRIC COUNCIL, 1975 - 1978.
- BOARD OF DIRECTORS, ARIZONA HEALTH PLAN, 1976 - 1981.
- VICE PRESIDENT, FAMILY HEALTH ASSOCIATES, PC, 1977 - 1981.
- BOARD OF DIRECTORS, YMCA, RENO, NEVADA, 1996 - 1999.
- CHAIRMAN, ARIZONA MEDICAL ASSOCIATION, PHYSICIAN'S HEALTH COMMITTEE, 1977 - 1984.
- PSYCHIATRIC EDITOR, ARIZONA MEDICINE, 1979 - 1985.
- MEMBER, MARICOPA COUNTY MEDICAL SOCIETY, PROFESSIONAL COMMITTEE, 1980.
- MEMBER, MARICOPA COUNTY MEDICAL SOCIETY, GRIEVANCE COMMITTEE, 1981 - 1982.
- CHAIRMAN, MARICOPA COUNTY MEDICAL SOCIETY, PROFESSIONAL COMMITTEE, 1981 - 1982.
- MEMBER, PHOENIX TOWN HALL, SEPTEMBER 1981.
- MEMBER, ARIZONA HEALTH CARE COST CONTAINMENT SYSTEM, TASK FORCE ON OUTPATIENT PSYCHIATRIC SERVICES, 1982 - 1983.
- MEMBER, EXECUTIVE COMMITTEE, MEDICAL DIRECTORS DIVISION, GROUP HEALTH ASSOCIATION OF AMERICA, 1983 - 1986.
- PSYCHIATRIC FACULTY, MARICOPA COUNTY COMBINED RESIDENCY TRAINING PROGRAM, 1973 - 1982.
- MEMBER, MEMBERSHIP COMMITTEE, GROUP HEALTH ASSOCIATION OF AMERICA, 1984 - 1986.
- MEMBER, AMA CONSULTING GROUP ON THE IMPAIRED PHYSICIAN, 1985.
- CLINICAL ASSOCIATE IN PSYCHIATRY, UNIVERSITY OF ARIZONA MEDICAL SCHOOL, 1987 - 1990.
- LECTURER IN PSYCHIATRY, UNIVERSITY OF ARIZONA MEDICAL SCHOOL, 1987 - 1990.
- CLINICAL PROFESSOR OF PSYCHIATRY, UNIVERSITY OF NEVADA, RENO, SCHOOL OF MEDICINE, 1990 TO PRESENT.
- FACULTY, NATIONAL JUDICIAL COLLEGE, CRIMINAL EVIDENCE, JUNE 22, 2000.
- FACULTY, NATIONAL JUDICIAL COLLEGE, CRIMINAL EVIDENCE, JULY 19, 2001.

**PAST APPOINTMENTS:**

- ASSEMBLY LIAISON TO THE STEERING COMMITTEE ON PRACTICE GUIDELINES, AMERICAN PSYCHIATRIC ASSOCIATION, 1994 THROUGH 2000.
- PEER REVIEW PANEL, PRESCRIBER'S LETTER, JANUARY 1998 TO 2000.



**MEMBERSHIP IN PROFESSIONAL AND SCIENTIFIC SOCIETIES:**

- ALPHA OMEGA ALPHA, 1965.
- PHI KAPPA PHI, 1965.
- AMERICAN PSYCHIATRIC ASSOCIATION, 1971 TO PRESENT.
- ARIZONA PSYCHIATRIC SOCIETY, 1972 - 1990.
- ARIZONA MEDICAL ASSOCIATION, 1972 - 1990.
- MARICOPA COUNTY MEDICAL SOCIETY, 1972 - 1990.
- AMERICAN ACADEMY OF MEDICAL DIRECTORS, 1982 - 1990.
- GROUP HEALTH ASSOCIATION OF AMERICA, MEDICAL DIRECTORS DIVISION, 1979 - 1990.
- PHOENIX PSYCHIATRIC COUNCIL, 1972 - 1985.
- AMERICAN GROUP PSYCHOTHERAPY ASSOCIATION, 1973 - 1975.
- AMERICAN ORTHOPSYCHIATRIC ASSOCIATION, 1973 - 1975.
- AMERICAN SOCIETY OF CLINICAL HYPNOSIS, 1977 - 1980.
- AMERICAN HOLISTIC MEDICAL ASSOCIATION, 1978 - 1980.
- ASSOCIATION FOR HOLISTIC HEALTH, 1978 - 1979.
- SOCIETY FOR PROSPECTIVE MEDICINE, 1978 - 1979.
- AMERICAN ACADEMY OF CLINICAL PSYCHIATRISTS, 1978 - 1980.

**PAST OFFICES:**

- PRESIDENT, NEVADA ASSOCIATION OF PSYCHIATRIC PHYSICIANS, 1997 - 1998.
- PRESIDENT-ELECT, NEVADA ASSOCIATION OF PSYCHIATRIC PHYSICIANS, 1996 - 1997.
- DEPUTY REPRESENTATIVE, NEVADA ASSOCIATION OF PSYCHIATRIC PHYSICIANS, 1993 - TO 2003.
- MEMBER, BOARD OF MANAGERS, RENO FAMILY YMCA, 1996 - 1999.
- SECRETARY, BOARD OF MANAGERS, RENO FAMILY YMCA, 1997 - 1999.

<u>LICENSES:</u>	<u>STATE</u>	<u>LICENSE NO.</u>	<u>ISSUED</u>	<u>STATUS</u>
	NEVADA	0149	1990	ACTIVE
	MICHIGAN	27062	1966	ACTIVE
	CALIFORNIA	CO30013	1968	ACTIVE
	OREGON	MD07793	1971	ACTIVE
	MARYLAND	D0012636	1999	ACTIVE
	ARIZONA	AZ7063	1971	ACTIVE
	TEXAS	G4528	1983	INACTIVE
	WASHINGTON	24324	1986	ACTIVE
	FLORIDA		1999	ACTIVE

- DEA NUMBER: AB3084439
- BOARD CERTIFIED BY THE AMERICAN BOARD OF PSYCHIATRY AND NEUROLOGY IN OCTOBER 1973. CERTIFICATION NUMBER: 12642.
- AMERICAN PSYCHIATRIC ASSOCIATION, COMMITTEE ON CERTIFICATION IN ADMINISTRATIVE PSYCHIATRY IN 1980. CERTIFICATE NUMBER: 767.
- AMERICAN BOARD OF MEDICAL MANAGEMENT, FEBRUARY 1989. CERTIFICATE NUMBER: 1009.
- BOARD CERTIFIED IN FORENSIC PSYCHIATRY BY THE AMERICAN BOARD OF PSYCHIATRY AND NEUROLOGY, JUNE 1998.

**PUBLICATIONS:**

- "A STRESS SCHEME FOR EVALUATING LABILE HYPERTENSION," MHRI PROGRAM REPORTS #15, ANN ARBOR 1965 WITH JOHN C. POLLARD, MD.
- "COLLECTIVE VIOLENCE IN URBAN AMERICAN," STANFORD M.D., 8:31, SPRING 1969.

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- "THE CHOICE OF COLLECTIVE VIOLENCE IN INTERGROUP CONFLICT," DANIELS, D., ET AL: VIOLENCE AND THE STRUGGLE FOR EXISTENCE, 165-191, LITTLE BROWN, BOSTON, 1970.
- "DILEMMAS OF MENTAL HEALTH SERVICE DELIVERY TO OFF-RESERVATION INDIANS," ANTHROPOLOGICAL QUARTERLY, THE CATHOLIC UNIVERSITY OF AMERICA PRESS, WASHINGTON DC, 46:172-182, JULY 1973.
- "VIDEOTAPE PRODUCTION BY MEDICAL EDUCATORS: SOME PRACTICAL CONSIDERATIONS," JOURNAL OF MEDICAL EDUCATION, 48:743-751, AUGUST 1973, WITH RICHARD METZNER, MD.
- "DIFFERENTIAL EFFECTS OF CONGRUENCE, STIMULUS, MEANING, AND INFORMATION ON EARLY AND LATE COMPONENTS OF THE AVERAGE EVOKED RESPONSE," NEUROPSYCHOLOGIA, 12:533-545, JANUARY 1974. PERGAMON PRESS, PRINTED IN ENGLAND WITH MONTE J. BUCHSBAUM, MD, AND RICHARD COPOLA.
- "CARDIOVASCULAR AND NEUROPHYSIOLOGIC CORRELATES OF SENSORY INTAKE AND REJECTION I: EFFECT OF COGNITIVE TASKS," PSYCHOPHYSIOLOGY, VOLUME 12, JULY 1975 WITH REDFORD B. WILLIAMS, JR., MD, MONTE J. BUCHSBAUM, MD, AND LYMAN C. WYNNE, MD.
- "INTENTIONAL ISONIAZID OVERDOSAGE AMONG SOUTHWESTERN AMERICAN INDIANS," AMERICAN JOURNAL OF PSYCHIATRY, VOLUME 132, No. 6, JUNE 1975 WITH MAURICE L. SIEVERS, MD, AND MICHAEL CYNAMON, MD.
- "INSURING INTENSIVE PSYCHOTHERAPY," LETTER TO THE EDITOR, AMERICAN JOURNAL OF PSYCHIATRY, 133:715-716, 1976.
- "SIX ESSENTIALS IN CHOOSING THE RIGHT ASSOCIATE," MEDICAL ECONOMICS, MAY 1976.
- "REACHING OUT TO THE DEPRESSED PHYSICIAN," JAMA, 236:1713-1716, OCTOBER 1976.
- "RUNNER'S GLUTTONY," RUNNER'S WORLD, PAGE 10, JUNE 1977.
- "HEALTH EVALUATION IN A PREPAID PLAN," CONTINUING EDUCATION, 18:630-73, FEBRUARY 1978, WITH JOSEPH LENTZ, MD, AND DONALD F. SCHALLER, MD.
- "THE EVOLUTION OF PSYCHIATRIC SERVICES IN A HEALTH MAINTENANCE ORGANIZATION," AMERICAN JOURNAL OF PSYCHIATRY, 135:339-342, MARCH 1978, WITH SCOTT IDZOREK, MD.
- "THE DISTRESSED PHYSICIAN: WHERE DO WE GO FROM HERE?" ARIZONA MEDICINE, 7:469-472, JULY 1978.
- "EVOLUTION OF PSYCHIATRIC SERVICES IN HEALTH MAINTENANCE ORGANIZATIONS," JOURNAL OF CONTINUING EDUCATION IN PSYCHIATRY, SEPTEMBER 1978 WITH SCOTT IDZOREK, MD.
- THE GUIDE TO DESERT RUNNING AND BODY MAINTENANCE, ARIZONA HEALTH PLAN, PHOENIX, ARIZONA, 1978.
- "KEY CONCEPTS IN THE DIAGNOSIS AND MANAGEMENT OF DEPRESSION FOR THE FAMILY PHYSICIAN, PART I - DIAGNOSES," ARIZONA MEDICINE, 135:801-802, DECEMBER 1978.
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YEAR	CASE NAME	CLIENT
1995	STATE OF NEVADA VS. GEORGE WALTER PRICE	CLARK COUNTY DA
1995	STATE OF NEVADA VS. EDWARD LEE JONES	CLARK COUNTY DA
1995	STATE OF NEVADA VS. DANIEL WOODROW BEARD	CLARK COUNTY DA
1995	NOREEN VS. AMERICAN BIODYNE, INC.	CHANDLER, TULLER, UDALL, REDHAIR (DEFENSE)
1995	CHRISTOPHER MCCULLEY	TESTIMONY IN DEFENSE
1996	STATE OF NEVADA VS. VANDAELE	CLARK COUNTY DA
1996	STATE OF NEVADA VS. BRIAN BROWN	R. BRUCE LINDSAY (DEFENSE)
1996	STATE OF NEVADA VS. CHRISTOPHER JONES	CLARK COUNTY DA
1997	STATE OF NEVADA VS. REX ARTHUR	CLARK COUNTY DA
1997	STATE OF NEVADA VS. RICHARD JOHNSON	CLARK COUNTY DA
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1997	STATE OF NEVADA VS. ZACHARY JOHN SCHERBERT	CLARK COUNTY DA
1997	STATE OF NEVADA VS. CHARLES JENNINGS	CLARK COUNTY DA
1997	RICHARD LINTON	ANN VOHL, ESQ. (DEFENSE)
1998	HIDROGO, ET AL VS. MINNESOTA MINING & MFG., ET AL	GEOFF WHITE, ESQ.
1998	DONNA BRIGHAM	BECKLEY, SINGLETON, JEMISON & LIST (DEFENSE)
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1998	STATE OF NEVADA VS. RODNEY ABEYTA	CLARK COUNTY DA
1998	STATE OF NEVADA VS. JEREMY STROHMEYER	CLARK COUNTY DA
1998	STATE OF NEVADA VS. CRAIG JACOBSON, AKA JOHN FLOWERS	CLARK COUNTY DA
1998	STATE OF NEVADA VS. THOMAS JENSEN	MARK PICKER, ESQ. (DEFENSE)
1998	STATE OF NEVADA VS. VINCENT TURNER	CLARK COUNTY DA
1999	NEVADA VS. BRIAN LEE ALLEN	PAUL C. GIESE, ESQ. (DEFENSE)
1999	STATE OF NEVADA VS. DROR SAR-AVIE	PATRICK MOONEY, ESQ. (DEFENSE)
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2001	RICCIARDI VS. WASHOE COUNTY SCHOOL DISTRICT, ET AL (EXPERT WITNESS IN BEHALF OF THE PLAINTIFFS)	TERRI KEYSER-COOPER, ESQ.
2001	STATE OF NEVADA VS. CLIFFORD MILLER	CLARK COUNTY DA
2001	STATE OF NEVADA VS. GARY RANDOLPH BENSON	ABBI SILVER, ESQ.
2001	STATE OF NEVADA VS. CHARLES JENNINGS	CLARK COUNTY DA
2001	JAMES PARKER VS. CONSECO	ABBI SILVER, DA
2001	WASHOE COUNTY VS. GEORGE SHOENBERGER	CLARK COUNTY DA
2001	STATE OF NEVADA VS. MITCHELL DETTLOFF	STEVEN HESS, ESQ.
2002	STATE OF NEVADA VS. DIRDEN	WASHOE COUNTY DA
2002	WOOD VS. SAFEWAY	KAREN WINCHLER, ESQ.
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2002	ROMEBERG VS. GOODMAN	CLARK COUNTY DA
2003	STATE OF NEVADA VS. FLOWERS AKA JACOBSEN	ABBI SILVER, DA
2003	EXPERT WITNESS, STATE VS. VORNELIUS PHILLIPS	CLARK COUNTY DA
2003	STATE OF NEVADA VS. ANTONY DOTSON	JAMES R. SWEETIN, DA
2003	STATE OF NEVADA VS. GERMAINE SMITH	DONALD EVANS, ESQ.
2003	TESTIFIED AS FRIEND OF THE COURT IN THE CASE OF STATE VS. ESCARENO	DANIEL JANTSCH, ESQ.
2003	COURT ORDERED EVALUATION IN THE CASE OF STATE VS. DENNIS	EDWARD R. J. KANE, DA
2003	WANELY VS. WELTY	ROBERT J. DASKAS
2004	STATE OF NEVADA VS. JASON EVAN BROWNE	CLARK COUNTY DA
2004	STATE OF NEVADA VS. JUDD PORTER	CHRISTOPHER OWENS, DA
2004	STATE OF NEVADA VS. ALFONSO MANUEL BLAKE	CLARK COUNTY DA
		DANAE ADAMS
		CLARK COUNTY DA
		RETAINED BY:
		JUDGE JOSEPH T. BONAVENTURE
		RETAINED BY:
		JUDGE JANET BERRY
		STEVE OSBORN, ESQ.
		DAVID SCHWARTZ, DA
		DOUGLAS HERNDON, DA
		ROBERT J. DASKAS, DA
		CHRISTOPHER LALLI, DA

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THE HONORABLE SCOTT JORDAN WASHOE COUNTY DISTRICT COURT, DEPT 11 P.O. BOX 11130 RENO, NV 89520	(775) 328-3800
THE HONORABLE JACK SCHROEDER WASHOE COUNTY JUSTICE COURT, DEPT 3 RENO COURTS, BLDG 1 SOUTH SIERRA RENO, NV	(775) 325-6505

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U.S. DISTRICT COURT  
DISTRICT OF NEVADA

BY HW DEPUTY

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

TERRY JESS DENNIS, by and through  
KARLA BUTKO, as Next Friend,

Petitioner,

vs.

MICHAEL BUDGE, Warden, and BRIAN  
SANDOVAL, Attorney General of the  
State of Nevada,

Respondents.

CV-S-04-0798-PMP(RJJ)

ORDER IN A DEATH PENALTY CASE

INTRODUCTION

On April 16, 1999, Terry Jess Dennis pled guilty in the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, to the first degree murder of Ilona Straumanis.<sup>1</sup> On July 20, 1999, a three-judge panel sentenced Dennis to death.

Dennis' execution is scheduled for July 22, 2004, at 9:00 p.m. Dennis has repeatedly and unequivocally expressed his desire to proceed with the execution as scheduled and objects to any further proceedings in Nevada State Court or Federal Court to delay or prevent Dennis' execution is scheduled for July 22, 2004.

<sup>1</sup> A detailed description of the crime is found in the Nevada Supreme Court's opinion affirming Dennis' conviction and sentence. See *Dennis v. State*, 116 Nev. 1075, 13 P.3d 434 (2000) (a copy of which is located in the record at Exhibit 58).

116



1 On June 14, 2004, Karla Butko, an attorney who represented Dennis in certain state  
2 court proceedings, commenced proceedings in this Court seeking standing to petition for a writ of  
3 habeas corpus on Dennis' behalf, as his next friend. Deferring as it must to the unambiguous and  
4 well-supported factual findings of the state courts, this Court finds Dennis to be competent, and  
5 therefore finds that Butko is without standing to proceed as his next friend. Consequently, the Court  
6 grants Respondents' Motion to Dismiss (Doc. #12) and dismisses this action without prejudice.

7  
8 **FACTUAL BACKGROUND**

9 On April 16, 1999, in Nevada's Second Judicial District Court, Dennis pled guilty  
10 to first degree murder with the use of a deadly weapon, and on July 20, 1999, he was sentenced to  
11 death. Exhibits 8, 25.<sup>2</sup> On December 4, 2000, the Nevada Supreme Court affirmed the conviction  
12 and sentence. Exhibit 58.

13 Dennis then filed a petition for a writ of habeas corpus in the state district court.  
14 Exhibit 26. The state district court denied relief, and Dennis appealed. Exhibit 41. While the appeal  
15 from denial of state habeas corpus relief was pending, Dennis wrote a letter to the state district court,  
16 the district attorney, and the Nevada Supreme Court, expressing his desire to abandon any appeals  
17 and to proceed with execution of his death sentence. Exhibits 42 and 47. On a motion by the State,  
18 the Nevada Supreme Court remanded the case to the state district court to determine if Dennis was  
19 competent to make the decision to abandon the appeal. Exhibit 48.

20 On remand, the state district court appointed a psychiatrist, Dr. Thomas E. Bittker,  
21 M.D., to examine Dennis and furnish a report regarding his mental capacity. Dr. Bittker examined  
22 Dennis on November 24, 2003, reviewed records, interviewed counsel, and prepared a report.  
23 Exhibit 50.

24  
25  
26 <sup>2</sup> The exhibits referred to in this Order by number are those filed by Butko and located in the  
record at Docs. #2, #3, and #4.

1 Dr. Bittker's report diagnosed Dennis with bipolar disorder, chemical dependency,  
2 attention deficit hyperactivity disorder, post-traumatic stress syndrome, mixed personality disorder  
3 with schizoid characteristics, and severe depression. Exhibit 50, pp. 7-8. Dr. Bittker's report  
4 reviewed evidence of a traumatic childhood, which included sexual and violent physical abuse.  
5 *Id.* at 2. Dr. Bittker reported that Dennis has a history of substance abuse, including the use of  
6 amphetamines, cocaine, marijuana, and alcohol. *Id.* at 4. Dr. Bittker reported that Dennis has  
7 sustained frequent head injuries, but has never received a neuropsychological examination to  
8 determine their effect. *Id.* at 4.

9 Dr. Bittker reported that Dennis has had a history of suicidal ideation and suicide  
10 attempts. *Id.* at 3, 5. The report notes that Dennis was discharged from military service in Vietnam  
11 because he was "suicidal," and that Dennis has admitted to several suicide attempts. *Id.* at 3, 5-6.  
12 Dr. Bittker's report states that Dennis "admits to frequent periods of despair, profound negativity,  
13 and feelings of hopelessness, helplessness, and worthlessness. *Id.* at 5. Dr. Bittker's report stated  
14 that Dennis was being treated with trazodone and lithium. *Id.* at 4-5.

15 Dr. Bittker came to the following conclusions in his report:

- 16 (1) The defendant does have sufficient present ability to consult with his  
17 attorney with a reasonable degree of factual understanding.
- 18 (2) The defendant has a rational and factual understanding of the  
19 proceedings. He is fully aware of the charges that he confronts, the  
20 implication of the sentence, and has a full understanding of what is  
21 involved in the death penalty. He is also aware of the legal options  
22 available to him and the consequences of his not proceeding with these  
23 options.
- 24 (3) The defendant is currently taking medications that are reasonable and  
25 consistent with the diagnosis of Bipolar Disorder, and his primary  
26 psychiatric problems, alcohol, amphetamine, and cocaine dependence,  
are contained by virtue of the total institutional control in his life.
- (4) The medications that he is taking are not having any unusual effect on  
the defendant's ability to make decisions in behalf of his own interest,  
and to cooperate with counsel or to participate in the court hearing

1 Exhibit 50, p. 8. Dr. Bittker also concluded:

2 On the other hand, the defendant has sustained over years episodes of suicidal  
3 ideation, suicide attempts, and self-destructive behavior, which heralded both  
4 the instant offense and his current legal strategy. I believe, with a reasonable  
5 degree of medical certainty, that the defendant's desire to both seek the death  
6 penalty and to refuse appeals in his behalf are directly a consequence of the  
7 suicidal thinking and his chronic depressed state, as well as his self-hatred.

8 \* \* \*

9 Clearly, an alternative to consider is whether or not the defendant's view of  
10 himself is simply a realistic incorporation of society's view of his "monstrous"  
11 behavior. On the other hand, it is conceivable, and, in my mind, likely that  
12 both the defendant's offense and his current court strategy spring from his  
13 psychiatric disorder and his substance abuse disorder, that he wishes to die  
14 and he wishes to be certain of a reasonably humane death. Consequently, the  
15 death penalty, as provided by the state, is quite congruent with both his intent  
16 and his psychiatric disorder.

17 *Id.* at 8-9.

18 The state district court then conducted a hearing on December 4, 2003. Exhibit 51.

19 The court admitted Dr. Bittker's report as evidence, and also canvassed Dennis. *Id.* at 7, 10-11, 17,  
20 20-37.

21 During the course of the state district court's canvass, the judge asked Dennis: "Tell  
22 me your views on what you want to happen in this case." *Id.* at 27. Dennis responded:

23 Well, I'm not sure what the process is step by step, but in the end,  
24 without, without getting into a biblical standard of an eye for an eye or  
25 anything like that, basically, I took a life and I'm ready to pay for that with  
26 mine.

27 *Id.* at 28.

28 At the hearing, the state court judge stated:

29 The Court is persuaded that based upon my review of Dr. Bittker's  
30 report and based upon my history of working with Mr. Dennis in this case and  
31 his previous psychiatric evaluations that he was competent at the time he  
32 entered his plea, made a knowing, intelligent, and voluntary plea, and that he  
33 is competent to make decisions on his own behalf at this juncture.

34 Dr. Bittker's report, although interesting, seemed to address all matters  
35 in the alternative, and his reference to the suicidal thinking and chronic  
36 depressed state are not supported at least from 1999 forward. There is no  
37 record of any suicide attempt by Mr. Dennis since I have come to know Mr.  
38 Dennis. Certainly, depression would be logical condition if one is facing the  
39 death penalty and death row.

1 But what is somewhat troublesome to the Court is Dr. Bittker seems to  
2 engage in an intellectual dialogue within this document of making alternative  
3 statements and global statements that date back to Mr. Dennis' childhood.  
4 The issue before the Court is to determine whether Mr. Dennis is competent at  
5 this juncture. He has already, the Court previously found him competent to  
6 enter a plea in 1999. We are now in 2004.

\* \* \*

7 ... [T]he Court is persuaded that pursuant to Nevada law the Defendant  
8 has the sufficient ability to understand the nature of these proceedings, to  
9 assist in making rational and competent decisions regarding his right, his  
10 appellate rights and his right to pursue a writ in this case and that he is  
11 competent to make those decisions based upon the Court's global  
12 understanding of this case, the Court's previous involvement with the plea in  
13 this case of Mr. Dennis, and the many hearings that the Court has conducted  
14 with Mr. Dennis.

15 And, also, although Dr. Bittker expresses concerns that -- well, again,  
16 on page eight Dr. Bittker says the following. He makes the following  
17 findings. "The Defendant does have sufficient present ability to consult with  
18 his attorney with a reasonable degree of factual understanding." Dr. Bittker's  
19 goes on to state, "The Defendant has a rational and factual understanding of  
20 the proceedings. He is fully aware of the charges that he confronts, the  
21 implication of the sentence, and has a full understanding of what is involved  
22 in the death penalty. He is also aware of the legal options available to him and  
23 the consequences of his not proceeding with these options." And when Dr.  
24 Bittker references options, he must be referencing the appeal and the writ  
25 process, but it is not clear in his report.

26 Dr. Bittker goes on to state, "The Defendant is currently taking  
medications that are reasonable and consistent with the diagnosis of Bipolar  
Disorder, and his primary psychiatric problems, alcohol, amphetamine, and  
cocaine dependence, are contained by virtue of the total institutional control in  
his life."

And, finally, Dr. Bittker states, "The medications that he is taking are  
not having any unusual effect on the Defendant's ability to make decisions on  
behalf of his own interest and to cooperate with counsel or to participate in the  
court hearing."

And I believe that was an issue of concern to the Court because of  
some comments made by Ms. Butko at a previous hearing. The Court is  
persuaded based upon those findings that Mr. Dennis is competent to  
understand the nature of these proceedings, assist in his own defense, and  
represent his interests appropriately.

And Mr. Dennis has made it abundantly clear that he does not wish to  
pursue further appeal or the writ in this case, so for those reasons I accept this  
report, and I find based upon, again, my understanding of the entire file, my  
interactions with Mr. Dennis and a review of Dr. Bittker's report that Mr.  
Dennis is not suffering from a mental disability or defect which precludes him

1 from making an informed decision in this case, assist in his own defense, and  
2 understand the nature of these proceedings.

3 In assessing Dr. Bittker's report, which will be made an exhibit to the  
4 Court's order, the Court finds that Mr. Dennis has sufficient present ability to  
5 consult with his attorney with a reasonable degree of factual understanding.  
6 and the Court further finds that Mr. Dennis has a rational and a factual  
7 understanding of these proceedings.

8 Exhibit 51, pp. 15-19

9 Following the hearing, on December 22, 2003, the state district court entered a written  
10 order finding Dennis to be competent. Exhibit 52. In the order, the state district court wrote:

11 10. The Court canvassed Dennis at length and accepts Dennis'  
12 representation that since he has been in prison he has not felt suicidal.  
13 However, Dr. Bittker notes in his report that Dennis experiences depression  
14 and suicidal thinking[.] Dennis disputes this representation. He  
15 acknowledges attempted suicide prior to 1995; however, he started taking  
16 medication in 1995, and has not attempted suicide since then nor has he made  
17 any suicide attempts while in prison. Based on Dr. Bittker's report and all  
18 other evidence before the court, the court finds Dennis does not suffer from  
19 any disease or mental defect that prevents him from making a rational choice  
20 among his various legal options -- including whether to pursue any further  
21 litigation that may save his life. The Court finds Dennis is capable of assisting  
22 in his own defense and understanding the nature of legal proceedings he may  
23 pursue to avoid or delay imposition of the death penalty.

24 11. Dennis was lucid during the court's canvass, and understood  
25 the court's questions and the purpose of the hearing. Dennis answered the  
26 court's questions with intelligence and insight. He denied experiencing any  
auditory or visual hallucinations. Dennis acknowledged receiving his  
medications as prescribed by the prison. Dennis was given an opportunity to  
ask questions of the court regarding his right to appeal and his right to any  
lifesaving form of relief whereby he might avoid the death penalty.

12. Dennis continues to maintain he wants to die. Dennis states he  
is "staunch in [his] decision[]" and wants the death penalty imposed against  
him as soon as possible. He expressly desires to forego his appellate rights or  
any form of litigation that may result in any legal relief from the imposition of  
death. Dennis understands that even if he were unsuccessful in any present or  
future litigation, such litigation might delay imposition of the death penalty.  
Dennis nevertheless desires to waive even the opportunity of extending his life  
through continued, albeit possibly unsuccessful, litigation that might delay his  
execution.

13. Dennis is aware of each and every claim for relief in his  
petition for writ of habeas corpus, and expressly desires to dismiss the petition  
and waive his appeal related to the petition. Dennis was advised he can renew  
his request for a hearing on his petition and the court will order a hearing.

1 Dennis states that he "took a life and I'm ready to pay for that with mine."  
2 Dennis understands that by waiving his appeal the death penalty will be  
3 imposed. Dennis desires the death sentence he received to be imposed against  
4 him.

5 14. Dennis has had sufficient time to consult with his attorneys  
6 regarding his desire to waive all litigation or forms of relief, including his  
7 appeal, and to proceed with his death sentence. Dennis understands that his  
8 counsel have done everything possible to this point to keep his legal options  
9 open for him. Counsel for Dennis have attempted to dissuade Dennis from  
10 waiving his appeal; counsel were prepared at all times to represent Dennis in  
11 any lifesaving litigation. The court finds, and Dennis personally agrees, there  
12 is no other information Dennis requires in order to supplement his decision to  
13 forego all litigation on his behalf. Dennis understands that if he continues to  
14 pursue his appeal or other forms of relief, his life might be spared.

15 15. Dennis knows how to read and write. No one has  
16 threatened Dennis or made any promise to him in his decision to waive  
17 all further litigation. Dennis understands that by waiving his appeal,  
18 the penalty of death is irreversible. Dennis understands that by  
19 waiving his appeal, any issues that were or could have been brought in  
20 the appeal are forever waived, and that his death would presumably be  
21 carried out without further delay or intervention. The Court has  
22 ordered Mr. Scott Edwards to continue his representation of Dennis  
23 and advised Dennis he may contact Mr. Edwards for any legal advice  
24 before imposition of the death penalty.

25 16. The Court has considered Dr. Bittker's report, Dennis'  
26 responses to the court's canvass, and the totality of the circumstances. The  
court finds Dennis is competent to waive his appeal and any other form of  
legal relief by any means that might spare his execution. Dennis has sufficient  
present ability to consult with his attorney with a reasonable degree of factual  
understanding, and he has a rational and factual understanding of the legal  
proceedings. The court finds that Dennis has voluntarily, knowingly, and  
intelligently waived his right to pursue further forms of relief that might save  
his life, including his right to appeal in CR99P0611, Supreme Court Case No.  
41664.

27 Exhibit 52, pp. 4-6 (footnote omitted).

28 The Nevada Supreme Court subsequently directed Dennis' counsel to file a  
29 voluntary withdrawal of the appeal, confirming that Dennis' continued desire to withdraw his appeal.  
30 Exhibit 53. On February 2, 2004, counsel filed a Notice of Withdrawal of Appeal. Exhibit 59.

31 On March 12, 2004, the Nevada Supreme Court filed an order dismissing the appeal.  
32 Exhibit 56. The court reiterated the salient portions of Dr. Bittker's report. *Id.* at 2-3. The court  
33 went on to describe the proceedings that had occurred on remand. *Id.* at 3-4. Then, the court denied

1 a motion by the Federal Public Defender to appear as *amicus curiae* on Dennis' behalf. *Id.* at 4-5.

2 The Nevada Supreme Court continued:

3           Next, we conclude that substantial evidence supports the district  
4 court's determination that Dennis is competent to make a rational choice to  
5 forgo further and possibly life-saving litigation, including this appeal.  
6 Specifically, the evidence, including the transcript of the district court's  
7 canvass at the December 4, 2003 hearing and Dr. Bittker's report, shows that  
8 Dennis has sufficient present ability to consult with counsel to a reasonable  
9 degree of factual understanding and has a rational and factual understanding of  
10 the proceedings. Dr. Bittker's opinions, which appear somewhat wide-  
11 ranging, merit extended discussion here. At the December 2003 hearing,  
12 Dennis's counsel, Edwards, noted the evidence of Dennis's various mental  
13 disorders as well as the portion of Dr. Bittker's report attributing Dennis's  
14 desire to seek the death penalty and refuse further appeal to his depressed state  
15 and self-hatred. Based upon this evidence, Edwards questioned whether  
16 Dennis has the "capacity to appreciate his position and make a rational choice  
17 with respect to continuing or abandoning further litigation." [Footnote 9:  
18 Quoting *Rees v. Peyton*, 384 U.S. 312, 314 (1966), cited in [*Calambro v.*  
19 *District Court*, 114 Nev. 961, 971, 964 P.2d 794, 800 (1998)]. See also  
20 *Godinez v. Moran*, 509 U.S. 389, 398 & n.9 (1993) (recognizing that there is  
21 no indication in *Rees* that its phrase "rational choice" means something  
22 different from "rational understanding" as used in [*Dusky v. United States*,  
23 362 U.S. 402, 402 (1960)].] However, the district court conscientiously  
24 inquired further to resolve whether Dennis's various disorders affected his  
25 capacity. We are satisfied with the district court's assessment of the totality of  
26 evidence to determine that Dennis's mental disorders have not rendered him  
incompetent to waive his rights.

          During the district court's canvass, Dennis denied that he reported to  
Dr. Bittker any suicidal ideation or hallucinations. He further denied having  
visual or auditory hallucinations. He acknowledged past suicidal feelings that  
were "usually behind alcohol" and past suicide attempts, but he denied feeling  
suicidal since having been imprisoned. Dennis indicated that he had been  
receiving medications in prison which had "pretty much squared [him] away."  
The record shows no suicide attempts by Dennis since the time of his 1999  
guilty plea. In addition, Dennis was examined by a psychiatrist and was found  
competent prior to entry of his plea. The district judge who presided over the  
instant competency proceeding had also presided over the 1999 proceedings  
leading to Dennis's guilty plea and death sentence and was able to consider  
Dennis's cognitive abilities with that historical perspective.

          Additionally, the transcripts from the December 2003 hearing indicate  
that Dennis was lucid during the canvass, understood the district court's  
questions and the purpose of the hearing, and answered the court's questions  
with intelligence and insight. The district court reviewed with Dennis the  
grounds raised in his habeas petition, and Dennis indicated that he was aware  
of and desired to give up his right to pursue all of these claims. Dennis  
showed a rational understanding of his legal position and the options available  
to him, including the claims raised in his habeas petition and the attendant  
legal proceedings, his right to proceed with this appeal, and the legal

1 consequences of withdrawing the appeal and abandoning further litigation.  
2 He understood, specifically, that by choosing to waive his rights to pursue  
3 further relief he would face imminent execution. Dennis repeatedly expressed  
4 and remained steadfast in his desire to forgo further proceedings that might  
5 delay or stop his execution. At one point he stated, "[My attorneys] about  
6 browbeat me to death, but no, I'm staunch in my decision." Finally, Dennis  
7 articulated rational reasons for choosing to forgo his legal challenges and be  
8 executed. [Footnote 11: *See Ford v. Haley*, 195 F.3d 603, 619-24 (11th Cir.  
9 1999).] He explained, "[B]asically, I took a life and I'm ready to pay for that  
10 with mine," and "I would rather not live than continue to live and be a  
11 doddering old man in prison." In sum, the record demonstrates that Dennis's  
12 decision was "intelligently made and with full comprehension of its  
13 ramifications." Furthermore, it is plain that Dennis is aware of his impending  
14 execution and the reason for it.

15 The district court determined that "Dennis does not suffer from any  
16 disease or mental defect that prevents him from making a rational choice  
17 among his various legal options -- including whether to pursue any further  
18 litigation that may save his life." Substantial evidence supports this factual  
19 finding as well as the district court's ultimate finding that Dennis is competent  
20 to waive his rights and determine whether to abandon further proceedings on  
21 his writ petition, including this appeal. [Footnote 14: *Cf. Rumbaugh v.*  
22 *Procurier*, 753 F.2d 395, 398-403 (5th Cir.) (upholding lower court's  
23 determination that defendant was competent despite concerns raised by reports  
24 from mental health professionals that defendant's mental illness influenced his  
25 decision to seek death), *cert. denied*, 473 U.S. 919 (1985); *Calambro*, 114  
26 Nev. at 972, 964 P.2d at 801 (upholding district court's determination that  
defendant was competent where evidence showed he was basically rational  
though he exhibited borderline mental retardation, was probably to some  
degree schizophrenic and had a history of hearing voices).] We further  
conclude that ample evidence likewise supports the district court's  
determination that Dennis's waiver of rights and decision to withdraw this  
appeal are voluntary, not the result of any improper influence, and are  
knowingly and intelligently made. Thus, we grant Dennis's motion to  
voluntarily withdraw this appeal, and ORDER this appeal DISMISSED.

*Id.* at 5-9 (footnotes omitted, except as noted).

On June 14, 2004, Butko, represented by the Federal Public Defender, filed a Petition  
for a Writ of Habeas Corpus on Dennis' behalf (Doc. #1). Butko filed three volumes of exhibits in  
support of the Petition (Docs. #2, #3, and #4). Butko filed a memorandum of points and authorities  
addressing the issue of her standing as Dennis' next friend (Doc. #5). Butko also filed an  
Application to Proceed *in Forma Pauperis* (Doc. #6), a Motion for Appointment of Counsel (Doc.  
#7), and a Motion for Stay of Execution (Doc. #8).



1           On June 15, 2004, the Court entered an Order (Doc. #9), setting a schedule for  
2 Respondents to respond to Butko's filings, and setting a hearing for July 1, 2004.

3           On June 28, 2004, Respondents filed a response to Butko's Motion for Appointment  
4 of Counsel (Doc. #10), an opposition to Butko's Motion for Stay of Execution (Doc. #11), and a  
5 Motion to Dismiss, focusing on the standing issue (Doc. #12). Respondents also filed two volumes  
6 of exhibits (Docs. #13 and #14).

7           The Court held a hearing on July 1, 2004 (Doc. #15 (transcript)). At the July 1  
8 hearing, the Court entertained argument by Butko's counsel, and by counsel for Respondents, on the  
9 subjects of Butko's standing and Dennis' competence. Over objection by Respondents, and to  
10 ensure a complete record, the Court allowed Butko to present testimony by Dr. Bittker (Butko and  
11 the Federal Public Defender have retained Dr. Bittker as their expert).

## 12 13 DISCUSSION

14           In order to have standing as a "next friend," (1) "a 'next friend' must provide an  
15 adequate explanation -- such as inaccessibility, mental incompetence, or other disability -- why the  
16 real party in interest cannot appear on his own behalf to prosecute the action," and (2) "the 'next  
17 friend' must be truly dedicated to the best interests of the person on whose behalf he seeks to litigate,  
18 ... and it has been further suggested that a 'next friend' must have some significant relationship with  
19 the real party in interest." *Whitmore v. Arkansas*, 495 U.S. 149, 166 (1990) (citations omitted).

20           Butko was Dennis' attorney in state court. Every indication is that Butko is truly  
21 dedicated to Dennis' best interests. There appears to be no real issue with respect to the second of  
22 the requirements for next friend standing set forth in *Whitmore*. The determinative question, with  
23 respect to next friend standing, is whether Dennis is competent to waive his right to proceed in this  
24 Court under 28 U.S.C. § 2254.

25           The test for competence, applicable in this context, was originally prescribed by the  
26 United States Supreme Court in *Rees v. Peyton*, 384 U.S. 312 (1966). The *Rees* Court stated the test

1 as follows:

2 whether [the petitioner] has capacity to appreciate his position and make a  
3 rational choice with respect to continuing or abandoning further litigation or  
4 on the other hand whether he is suffering from a mental disease, disorder, or  
5 defect which may substantially affect his capacity in the premises.

6 *Rees*, 384 U.S. at 314.

7 Federal circuit courts applying *Rees* have read the *Rees* test to raise three questions  
8 that must be answered to determine the competency of a person facing execution to forgo federal  
9 habeas corpus proceedings:

- 10 (1) Is the person suffering from a mental disease or defect?
- 11 (2) If the person is suffering from a mental disease or defect, does that  
12 disease or defect prevent him from understanding his legal position  
13 and the options available to him?
- 14 (3) If the person is suffering from a mental disease or defect which does  
15 not prevent him from understanding his legal position and the options  
16 available to him, does that disease or defect, nevertheless, prevent him  
17 from making a rational choice among his options?

18 *Rumbaugh v. Proconier*, 753 F.2d 395, 398 (5th Cir.), *cert. denied*, 473 U.S. 919 (1935); *see also*  
19 *Mata v. Johnson*, 210 F.3d 324, 328 (5th Cir. 2000); *Ford v. Haley*, 195 F.3d 603, 617 (11th Cir.  
20 1999); *Lonchar v. Zant*, 978 F.2d 637, 641-42 (11th Cir. 1992). Two federal district courts in this  
21 circuit have applied *Rees* in the manner articulated in *Rumbaugh*. *See Comer v. Stewart*, 230  
22 F.Supp.2d 1016, 1034-37 (D.Ariz.2002); *Mason v. Vasquez*, 1993 WL 204625, \*3 (N.D.Cal. 1993).  
23 The *Rumbaugh* court added the following explanation regarding the three-part inquiry set forth in  
24 that case:

25 If the answer to the first question is no, the court need go no further, the  
26 person is competent. If both the first and second questions are answered in the  
affirmative, the person is incompetent and the third question need not be addressed.  
If the first question is answered yes and the second is answered no, the third question  
is determinative; if yes, the person is incompetent, if no, the person is competent.

27 *Rumbaugh*, 753 F.2d at 398-99. This Court concludes that the three-part inquiry described in  
28 *Rumbaugh* provides the proper framework for determining Dennis' competency under *Rees*.

1 In applying the *Rees/Rumbaugh* test to determine whether Dennis is competent, the  
2 Court must consider the effect of the state courts' prior rulings regarding Dennis' competency. This  
3 question is governed by the Antiterrorism and Effective Death Penalty Act (AEDPA). Under 28  
4 U.S.C. § 2254(e)(1), a provision added to the habeas corpus statute by the AEDPA: "a  
5 determination of a factual issue made by a State court shall be presumed to be correct," and the  
6 Petitioner "shall have the burden of rebutting the presumption of correctness by clear and convincing  
7 evidence." 28 U.S.C. § 2254(e)(1).

8 The state district court made factual findings, which answer in the negative the second  
9 and third *Rumbaugh* inquiries. Concerning the second *Rumbaugh* inquiry, the state district court  
10 found:

11 The Court finds Dennis is capable of assisting in his own defense and  
12 understanding the nature of legal proceedings he may pursue to avoid or delay  
imposition of the death penalty.

13 \* \* \*

14 Dennis has sufficient present ability to consult with his attorney with a  
15 reasonable degree of factual understanding, and he has a rational and factual  
understanding of the legal proceedings.

16 Exhibit 52, p. 4, lines 21-23, and p. 6, lines 8-10.<sup>3</sup> With respect to the third *Rumbaugh* inquiry, the  
17 state district court found:

18 Dennis does not suffer from any disease or mental defect that prevents him  
19 from making a rational choice among his various legal options -- including  
whether to pursue any further litigation that may save his life.

20 Exhibit 52, p. 4, lines 18-21. The Nevada Supreme Court found the district court's findings to be  
21 supported by substantial evidence. Exhibit 56.

22 This Court affords those state-court findings the deference mandated by 28 U.S.C.  
23 § 2254(e)(1) -- they are presumed to be correct. Butko has not rebutted that presumption by clear  
24 and convincing evidence.

25 \_\_\_\_\_  
26 <sup>3</sup> Indeed, Butko concedes that Dennis meets the standard of competency with respect to the  
second *Rumbaugh* inquiry. See Transcript of July 1 hearing (Doc. #15), pp. 32-33. Butko takes issue  
only with Dennis' volitional capacity -- the third *Rumbaugh* inquiry. *Id.*

1 In view of the state court factual findings, application of the *Rees/Rumbaugh* test  
2 leads to the conclusion that Dennis is competent.

3 Butko argues on several grounds that this Court should not defer to the state court  
4 findings. First, Butko argues that the state courts applied the wrong standard in determining Dennis'  
5 competency. The Court disagrees. The state district court was aware of *Rees*. See Exhibit 52, p. 9.  
6 And, the terms in which the state district court stated its factual findings make clear that the court  
7 effectively applied the *Rees/Rumbaugh* standard.

8 Moreover, Butko's argument that the state court applied the wrong legal test misses  
9 the point. This Court defers to the state courts' factual findings, pursuant to 28 U.S.C. § 2254(e)(1).  
10 This Court does not defer to the state courts' legal conclusions. Section 2254(d), which describes  
11 the deference that a federal court must afford state courts' legal conclusions in a habeas case, applies  
12 to state court adjudication of claims on the merits. See 28 U.S.C. § 2254(d). The question of  
13 Dennis' competence does not involve the adjudication of a claim on the merits.

14 Second, Butko asserts that the state-court finding that "Dennis does not suffer from  
15 any disease or mental defect that prevents him from making a rational choice among his various  
16 legal options -- including whether to pursue any further litigation that may save his life" -- was  
17 contrary to Dr. Bittker's report. Again this Court disagrees. Dr. Bittker's report did not directly  
18 address the third *Rumbaugh* inquiry. Dr. Bittker did not state an opinion that Dennis was unable to  
19 make a rational choice. Rather, Dr. Bittker's report stated that Dennis' decision to forgo appeals is  
20 "directly a consequence of the suicidal thinking and his chronic depressed state, as well as his self-  
21 hatred," that Dennis' decision "spring[s] from his psychiatric disorder and his substance abuse  
22 disorder," and that his decision "is quite congruent with both his intent and his psychiatric disorder."  
23 Exhibit 50, pp. 8-9. Even when questioned at the July 1 hearing before this Court, Bittker avoided  
24 providing an opinion in the terms of the third *Rumbaugh* inquiry. See Transcript of July 1 hearing  
25 (Doc. #15), pp. 63-65. Butko has failed to demonstrate by clear and convincing evidence from the  
26 opinion stated by Dr. Bittker that Dennis suffers from a mental disease or defect that prevents him

1 from making a rational choice among his options. It was up to the state court to make a finding in  
2 that regard. The state court weighed the evidence before it, resolved conflicts in the evidence, and  
3 concluded that the answer was no. *See* Exhibit 51, pp. 15-19.

4 Nothing presented to the Court by Butko -- including her arguments regarding the  
5 state proceedings, and the testimony of Dr. Bittker at the July 1 hearing -- and nothing in this Court's  
6 canvass of Dennis, shows by clear and convincing evidence that any of the state court findings were  
7 erroneous.

8 Third, Butko asserts that the state court proceedings, leading to the findings regarding  
9 Dennis' competency, did not comport with due process, because they were not adversarial. As a  
10 result, Butko insists that the state court findings do not warrant deference pursuant to 28 U.S.C.  
11 § 2254(e)(1). The Court rejects this argument as well. The state district court appointed a neutral  
12 psychiatrist to examine Dennis and report on his competence. The state court proceedings were a  
13 fair and effective means of resolving the question of Dennis' competence. Butko has not cited any  
14 authority supporting the proposition that the state court's procedure led to a deprivation of Dennis'  
15 constitutional due process rights.

16 As a final matter: Butko has proffered no meaningful evidence -- indeed, no evidence  
17 whatsoever -- indicating that there has been any change in Dennis' condition since the state-court  
18 determination regarding his competence. *See Demosthenes v. Baal*, 495 U.S. 731, 736 (1990) (no  
19 evidentiary hearing warranted without a showing of "meaningful evidence" of incompetency).  
20 Indeed, the understanding, rationality and overall competence of Dennis displayed at the extensive  
21 canvass conducted by this Court at the July 1 hearing, is quite congruent with the factual findings  
22 made by the state court which establish Dennis' competence within the meaning of *Rees* and  
23 *Rumbaugh*. *See* Transcript of July 1 Hearing (Doc. #15), pp. 5-24. In sum, Dennis understands his  
24 legal position and the options available to him, and he is able to make rational choices.

25 Accordingly, affording the state court factual findings the deference mandated by  
26 28 U.S.C. § 2254(e)(1), this Court concludes that Dennis is competent to make his own decision to

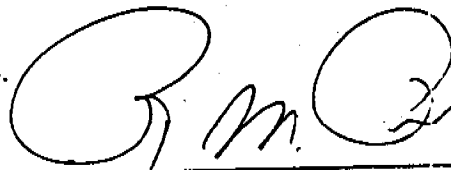
1 waive his right to pursue habeas corpus relief in this Court. Butko does not qualify for "next friend"  
2 standing. Respondents' Motion to Dismiss (Doc. #12) shall therefore be granted, and Butko's  
3 Motions shall be denied.

4 **IT IS THEREFORE ORDERED** that Respondents' Motion to Dismiss (Doc. #12)  
5 is **GRANTED**. This action is dismissed without prejudice.

6 **IT IS FURTHER ORDERED** that the Clerk shall **ENTER JUDGMENT**  
7 **ACCORDINGLY**.

8 **IT IS FURTHER ORDERED** that the Application to Proceed *in Forma Pauperis*  
9 (Doc. #6), the Motion for Appointment of Counsel (Doc. #7), and the Motion for Stay of Execution  
10 (Doc. #8) are **DENIED**.

11 Dated this 6<sup>th</sup> day of July, 2004.



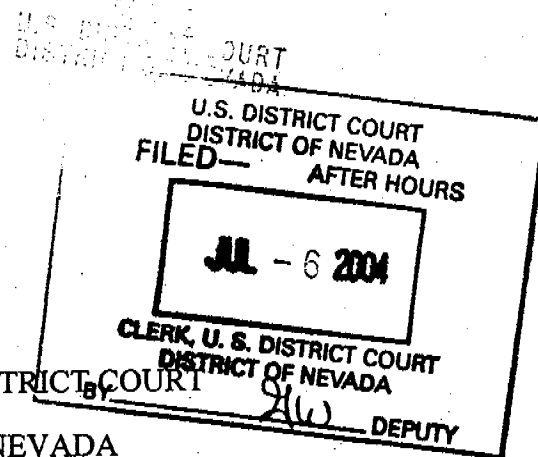
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13 **CHIEF UNITED STATES DISTRICT JUDGE**  
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ORIGINAL

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Attorneys for Petitioner/Next Friend

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA



TERRY JESS DENNIS, by and through  
KARLA BUTKO, as Next Friend,

Petitioner,

vs.

MICHAEL BUDGE, Warden, and  
BRIAN SANDOVAL, Attorney General  
of the State of Nevada,

Respondents.

Case No. CV-S-04-0798-PMP(RJJ)

NOTICE OF APPEAL

(Death Penalty Habeas Corpus Case)

NOTICE IS HEREBY GIVEN that Terry Jess Dennis, petitioner herein, hereby appeals to  
the United States Court of Appeals for the Ninth Circuit from the judgment entered in the above-

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1 entitled case on July 6, 2004.

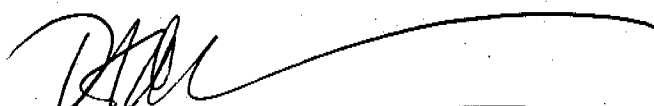
2 Dated this 6<sup>th</sup> day of July, 2004.

3 Respectfully submitted,

4 FRANNY A. FORSMAN  
5 Federal Public Defender

6 

7 Michael Pescetta  
8 Assistant Federal Public Defender

9 

10 Rebecca A. Blaskey  
11 Assistant Federal Public Defender

12 Attorneys for Petitioner/Next Friend

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Dennis J. Jack  
An employee of the Federal Public Defender

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DISTRICT OF NEVADA

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

BY \_\_\_\_\_ DEPUTY

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TERRY JESS DENNIS, by and through  
KARLA BUTKO, as Next Friend,

Petitioner,

CV-S-04-0798-PMP (RJJ)

v.

MICHAEL BUDGE, Warden, and BRIAN  
SANDOVAL, Attorney General of the  
State of Nevada,

Respondents.

ORDER

On July 6, 2004, Petitioner Terry Jess Dennis filed a Notice of Appeal (#18) from this Court's Order and Judgment (#16 and #17) entered July 6, 2004. Although Petitioner filed no Application for Certificate of Appealability pursuant to 28 U.S.C. § 2253 and Rule 22(b) of the Federal Rules of Appellate Procedure, Petitioner's appeal raises a substantial question for review by a court of appeals regarding his Petition for Writ of Habeas Corpus.

IT IS THEREFORE ORDERED that the issuance of a Certificate of Appealability is granted.

DATED: July 7, 2004

  
PHILIP M. PRO  
Chief United States District Judge

TOTAL P.02

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Case number: CV-S-04-0798 - PMP-RJJ  
Terry Jess Dennis, et al v. Michael Budge, et al DEATH PENALTY  
Status: Closed

Doc #: 1	Date Filled: 6/14/2004	Status:	EOD:
Docket Type: PETITION FOR HABEAS CORPUS		Docket Title:	Judge:
Caption: Death Penalty obo Ptnr. (execution sched 7/19/04) (DISPO: exhbts #2 thru #4)			
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Doc #: 2	Date Filled: 6/14/2004	Status:	EOD:
Docket Type: EXHIBITS		Docket Title:	Judge:
Caption: Vol. 1 to ptn for writ (#1) obo Ptnr. FLD SEP			
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Doc #: 3	Date Filled: 6/14/2004	Status:	EOD:
Docket Type: EXHIBITS		Docket Title:	Judge:
Caption: Vol. 2 to ptn for writ (#1) obo Ptnr. FLD SEP			
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Doc #: 4	Date Filled: 6/14/2004	Status:	EOD:
Docket Type: EXHIBITS		Docket Title:	Judge:
Caption: Vol. 3 to ptn for writ (#1) obo Ptnr. FLD SEP			
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Doc #: 5	Date Filled: 6/14/2004	Status:	EOD:
Docket Type: MEMORANDUM		Docket Title:	Judge:
Caption: w/respect to standing of "Next Friend" obo Ptnr/Next Friend.			
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Doc #: 6	Date Filled: 6/14/2004	Status: Disposed - 16	EOD:
Docket Type: MOTION/NON DISPOSITIVE		Docket Title: IN FORMA PAUPERIS	Judge:
Caption: obo Ptnr. (DISPO: DENIED #16)			
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Doc #: 7	Date Filled: 6/14/2004	Status: Disposed - 16	EOD:
Docket Type: MOTION/NON DISPOSITIVE		Docket Title:	Judge:
Caption: for appt of cnsl obo Ptnr. (DISPO: resp #10; DENIED #16)			
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Doc #: 8	Date Filled: 6/14/2004	Status: Disposed - 16	EOD:
Docket Type: MOTION/NON DISPOSITIVE		Docket Title:	Judge:
Caption: for stay of execution obo Ptnr. (sched on 7/19/04) (DISPO: resp #11; DENIED #16)			
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Doc #: 9	Date Filled: 6/15/2004	Status:	EOD:
Docket Type: ORDER		Docket Title:	Judge: PMP
Caption:			

ER 1908

ORD Rspdntrs shall have to 6/28/04 to file/serv P&As in resp to Ptnr's docs. This matter is placed on cal for hrng in Bruce R. Thompson Cthouse in Reno, NV on 7/1/04 @ 1:30 pm. Rspdntrs shall make arrangements to have Ptnr present in ctrm at hrng. cpys dist

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<b>Doc #:</b> 10	<b>Date Filled:</b> 6/28/2004	<b>Status:</b>	<b>EOD:</b>
<b>Docket Type:</b> RESPONSE		<b>Docket Title:</b>	<b>Judge:</b>
<b>Caption:</b>			
to mtn for appt of cnsl (#7) obo Rspdntrs. (m)			

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<b>Doc #:</b> 11	<b>Date Filled:</b> 6/28/2004	<b>Status:</b>	<b>EOD:</b>
<b>Docket Type:</b> RESPONSE		<b>Docket Title:</b> OPPOSITION	<b>Judge:</b>
<b>Caption:</b>			
to mtn for stay (#8) obo Rspdntrs. (m)			

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<b>Doc #:</b> 12	<b>Date Filled:</b> 6/28/2004	<b>Status:</b> Disposed - 16	<b>EOD:</b>
<b>Docket Type:</b> MOTION/DISPOSITIVE		<b>Docket Title:</b> DISMISS	<b>Judge:</b>
<b>Caption:</b>			
obo Rspdntrs. (m) (DISPO: exhbts #13 & #14; GRANTED #16			

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<b>Doc #:</b> 13	<b>Date Filled:</b> 6/28/2004	<b>Status:</b>	<b>EOD:</b>
<b>Docket Type:</b> EXHIBITS		<b>Docket Title:</b>	<b>Judge:</b>
<b>Caption:</b>			
Vol.1 to mtn to dismiss (#12) obo Rspdntrs. (m) FLD SEP			

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<b>Doc #:</b> 14	<b>Date Filled:</b> 6/28/2004	<b>Status:</b>	<b>EOD:</b>
<b>Docket Type:</b> EXHIBITS		<b>Docket Title:</b>	<b>Judge:</b>
<b>Caption:</b>			
Vol. 2 to mtn to dismiss (#12) obo Rspdntrs. (m) FLD SEP			

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<b>Doc #:</b> 15	<b>Date Filled:</b> 7/6/2004	<b>Status:</b>	<b>EOD:</b>
<b>Docket Type:</b> MINUTES OF PROCEEDINGS		<b>Docket Title:</b> HEARING	<b>Judge:</b> PMP
<b>Caption:</b>			
dtd 7/1/04 Ct Reporter: Kathryn French: RE: Hrng on ptn for writ (#1) memo re Next Friend (#5); mtn for IFP (#6); mtn for appt of cnsl (#7) & Mtn for stay of execution (#8); (see doc) Matter is taken under sub. Ct will issue written ruling. cpys dist			

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<b>Doc #:</b> 16	<b>Date Filled:</b> 7/6/2004	<b>Status:</b>	<b>EOD:</b>
<b>Docket Type:</b> ORDER		<b>Docket Title:</b>	<b>Judge:</b> PMP
<b>Caption:</b>			
ORD Rspdntrs' mtn to dismiss (#12) is GRANTED. This actn is DISM w/o prej. Clk shall enter JUDGMENT ACCORDINGLY. App to procd IFP (#6), mtn for appt of cnsl (#7) and mtn for stay of execution (#8) are DENIED. cpys dist			

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<b>Doc #:</b> 17	<b>Date Filled:</b> 7/6/2004	<b>Status:</b>	<b>EOD:</b>
<b>Docket Type:</b> JUDGMENT		<b>Docket Title:</b>	<b>Judge:</b> PMP
<b>Caption:</b>			
ORD Rspdntrs' mtn to dismiss is GRANTED. Petition is DISM w/o prejudice. Judgment is hereby entered in favor of Rspdntrs and against Ptnr. cpys dist			

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<b>Doc #:</b> 18	<b>Date Filled:</b> 7/6/2004	<b>Status:</b> Disposed - 20	<b>EOD:</b>
<b>Docket Type:</b> NOTICE OF APPEAL		<b>Docket Title:</b>	<b>Judge:</b>
<b>Caption:</b>			

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re #16 & #17 obo Ptnr/Next Friend. (m) no fees pd.

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Doc #: 19	Date Filled: 7/7/2004	Status:	EOD:
Docket Type: TRANSMITTAL		Docket Title:	Judge:
Caption:			
(cpy) Orig to C/A re Ntc of Appeal; dkt fees not pd; design of transcript form snt; cc of dkt sheet. cpys dist			

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Doc #: 20	Date Filled: 7/7/2004	Status:	EOD:
Docket Type: ORDER		Docket Title:	Judge: PMP
Caption:			
ORD Issuance of Cert of Appealability is GRANTED. cpys dist			

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Case Number: CV-S-04-0798 - PMP-RJJ  
Cost: 0.07

United States District Court for the District of Nevada

ER 1910

